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# A TREATISE

ON THE

# AMERICAN LAW RELATING TO MINES AND MINERAL LANDS

WITHIN THE

## PUBLIC LAND STATES AND TERRITORIES

AND

## GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN

BY

CURTIS H. LINDLEY
Of the San Francisco Bar

**THIRD EDITION**

IN THREE VOLUMES

**VOLUME III**

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*"I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."*

*Bacon's Tracts.*

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*"Et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus."*

*—From Dedication of Justinian's Institutes.*

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# CHAPTER III.

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## ARTICLE I. LODE CLAIMS.


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**§ 677. Posting of the notice and copy of the plat on the claim.**—As a condition precedent to the filing of an application for patent to a lode claim, the claimant is



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required to post a copy of the plat of the survey in a conspicuous place upon the claim,[1] together with a notice of his intention to apply for a patent therefor, which notice must state the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district, and county,[2] and the names of adjoining and conflicting claims as shown by the plat of survey,[3] or the number of the survey of such conflicting claims.[4]

The notice should contain a description of the claim in the form of a condensed transcript of the field-notes. It should be practically a counterpart of the notice which is to be published and posted in the office of the register of the land office. There is no necessity for describing the lode line, if there is one on the plat,[5] or for embodying in the notice the entire field-notes, calls for all bearing objects, topography, and other *data* found in the surveyor's report; but it should clearly follow, by course and distance, the exterior lines, and describe the course and length of the connecting line by which the mineral survey is "tied" to the public surveys, or to a United States mineral monument if

[1] Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31; De Long v. Hill, 9 Copp's L. O. 114; Min. Reg., par. 39, Appendix.

[2] A mistake in the name of the county—i. e., designating the wrong one—would invalidate the notice. Wright v. Sioux Cons. M. Co., 29 L. D. 154; S. C., on review, 29 L. D. 289.

[3] Gen. Min. Reg., par. 39, Appendix; In re Ellison, 29 L. D. 250.

[4] Neilson v. Champagne M. & M. Co., 29 L. D. 491.

Under prior regulations, the notice was required to state, in addition to the foregoing, whether or not the location is of record and, if so, where the record may be found, the number of feet claimed along the vein and the presumed direction thereof, and the name or names of *all* adjoining and conflicting claims, whether surveyed or unsurveyed. Gowdy v. Kismet G. M. Co., 24 L. D. 191; 25 L. D. 216; Gowdy v. Connell, 27 L. D. 56; S. C., on review, 28 L. D. 240.

[5] Beik v. Nickerson, 29 L. D. 662.

the lands in the vicinity are unsurveyed. A failure to observe this important requirement will vitiate the subsequent proceedings and necessitate a commencement *de novo*.[6] In the notice each claim in a group should be tied to a mineral monument or government corner.[7]

Neither the posted nor published notice is required to contain any words of citation or to designate the time within which adverse action must be taken.[7a]

The posting of this notice on the claim and in the register's office and its subsequent publication are jurisdictional matters, any serious irregularity in which may jeopardize, if not wholly vitiate, the subsequent proceedings. The posted and published notices constitute "process" in this procedure under the mining laws.[8] If any one of the three notices is insufficient, they are all rendered valueless.[9]

In determining the sufficiency of these notices they must be taken as a whole, and when so considered if the situation of the applicant's claim on the ground is designated with substantial accuracy, the notice must be held sufficient.[10]

[6] Nil Desperandum Placer, 10 L. D. 198; Tennessee Lode, 7 L. D. 392; Emperor Wilhelm Lode, 5 L. D. 685; Hoffman v. Venard, 14 L. D. 45; Broad Ax Lode, 22 L. D. 244; Sulphur Springs Quicksilver Mine, 22 L. D. 715; Hallett and Hamburg Lodes, 27 L. D. 104; In re Wax, 29 L. D. 592; Alice Lode, 30 L. D. 481. See, *ante*, § 671, for discussion of the effect of an erroneous tie line. Also see In re Peck, 34 L. D. 682.

[7] Juno et al. Lode Claims, 37 L. D. 365.

[7a] Draper v. Wells, 25 L. D. 550; Davidson v. Eliza G. M. Co., 28 L. D. 550.

[8] Stock Oil Co., 40 L. D. 198, 203. They are in effect a summons to all adverse claimants. Hesley v. Rupp, 37 Colo. 25, 87 Pac. 1015, 1016.

[9] Gross v. Hughes, 29 L. D. 467.

[10] Hallett and Hamburg Lodes, 27 L. D. 104; Gowdy v. Connell, 28 L. D. 240; Opie v. Auburn G. M. & M. Co., 29 L. D. 230; Suburban G. M. Co. v. Gibberd, 29 L. D. 558; Neilson v Champagne M. & M. Co., 29 L. D. 491; Reed v. Bowron, 32 L. D. 383.

The purpose of the law relating to publication and posting of plat and notice of intention to apply for patent is to afford an opportunity to adverse claimants or others to object and to present grounds of their objections.[11]

The law does not provide for nor does any departmental regulation require the notice to contain a citation to adverse claimants fixing the time within which adverse claims should be filed.[12] The statute fixes the time and constitutes the citation.[13]

Posting is one of the three methods to be pursued simultaneously, by which all persons are to be given notice of the intention to procure title to the land.[14] To this end the law requires the notice and one of the official plats[15] to be posted at a conspicuous place on the claim.

It is difficult to lay down any general rule as to what should be construed to be a conspicuous place on a mining claim. The word "conspicuous" as used in the statute is construed to mean "open to view; obvious to the eye; easy to be seen; plainly visible; manifest; attracting the eye," and is synonymous with "prominent." In the light of this meaning a notice and plat inclosed in an envelope and tacked beneath the groundsill of the building, although within range of ordinary vision, is not a satisfactory posting, although the en-

11 Rowena Lode, 7 L. D. 477, 479; Tom Moore Cons. M. Co. v. Nesmith, 36 L. D. 199.

12 Davidson v. Eliza G. M. Co., 28 L. D. 550.

13 Draper v. Wells, 25 L. D. 550; Gross v. Hughes, 29 L. D. 467.

14 Byrne v. Slauson, 20 L. D. 43–45; Ferguson v. Hanson, 21 L. D. 336, 339.

15 Rev. Stats., § 2325; Min. Reg., par. 39; Mojave M. & M. Co. v. Karma M. Co., 34 L. D. 583. In this case the affidavit of posting did not state that the plat had been posted with the notice, though the copy of the notice attached to the affidavit did so state. The affidavit was held insufficient.

velope was marked to indicate its contents.[16] Where there are improvements in the shape of buildings used in connection with mining operations, postings on such buildings would certainly fulfill the requirements of the law.[17] In the absence of structures of this character, posting at the discovery shaft or at the mouth of open workings, being the places most likely to attract attention, are suggested by the department as being proper places.[18]

A posting within a tunnel, under cover, where the notice could not be seen without the aid of an artificial light, was held to be a manifest evasion of the law.[19]

It ought not to be difficult to discriminate between a reasonable attempt to comply with the law in good faith and a studied effort to place the notice where it cannot be seen.

Proper care should be exercised in protecting the posted notice from the weather and to prevent its becoming illegible, as, if its contents should become obliterated, a new posting and publication might become necessary.[20]

Where a millsite is applied for in connection with a lode, a copy of the plat and notice of intention to apply for a patent should also be posted upon it,[21] although the department has at times condoned the failure to comply with this rule,[22] or protected the claimant from

16 Tom Moore Cons. M. Co. v. Nesmith, 36 L. D. 199, overruling Lonergan v. Shockley, 33 L. D. 238.

17 Gowdy v. Kismet M. Co., 22 L. D. 624; Louisville Lode, 1 L. D. 548.

18 Ferguson v. Hanson, 21 L. D. 336.

19 Pratt v. Avery, 7 L. D. 554.

20 Gross v. Hughes, 29 L. D. 467.

21 Gen. Min. Reg., par. 63, Appendix; Silver Star Millsite, 25 L. D. 165; Peacock Millsite, 27 L. D. 373.

22 In re Bailey and Grand View M. & S. Co., 3 L. D. 386. See Peacock Millsite, 27 L. D. 373.

the necessity of commencing *de novo,* by a reference of the case to the board of equitable adjudication,[23] as falling within the sanction of section twenty-four hundred and fifty-seven of the Revised Statutes,[24] a course, however, which it subsequently declined to follow.[25]

In the case of an application for a group of contiguous claims, there does not seem to be any specific regulation on the subject of posting. The law provides that the posting shall be on the land *embraced in the plat*,[26] and the regulations provide that it shall be upon the "claim."[27] As the consolidation of claims is shown on the plat, it might reasonably be inferred that a posting at any conspicuous place within the group would suffice, without the necessity of posting on each location within the composite, and so far as we are advised this is the rule followed by the land department.[28]

23 The board of equitable adjudication consists of the secretary of the interior and attorney-general (Rev. Stats., § 2451; 19 Stat. 244; Comp. Stats. 1901, p. 1518; 6 Fed. Stats. Ann. 524), and is charged with passing adjudications made by the commissioner "upon the principles of equity and justice, as recognized by courts of equity." Rev. Stats., § 2450; 19 Stat. 244; Comp. Stats. 1901, p. 1518; 6 Fed. Stats. Ann. 522. This board gives relief in cases "where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained," and where there is no adverse claim. Rev. Stats., § 2457; 11 Stat. 22; Comp. Stats. 1901, p. 1520; 6 Fed. Stats. Ann. 525. It supplies "broken threads" in the chain of title. Pecard v. Camens, 4 L. D. 152, 156. As to functions and jurisdiction of the board, see Hawley v. Diller, 178 U. S. 476, 491, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157. As to the regulations governing proceedings before this board, see 6 L. D. 799; 10 L. D. 502; 39 L. D. 320.

24 New York Lode and Millsite, 5 L. D. 513.

25 Peacock Millsite, 27 L. D. 373.

26 Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31.

27 Min. Reg., par. 39, Appendix.

28 This rule has been upheld and applied to a group of millsites. Phoenix Gold M. Co., 40 L. D. 313.

The notice should be posted in the presence of two witnesses, who should sign the same for purposes of identification.

**§ 678. The initiatory proceedings in the land office.** Upon posting the notice of intention to apply for a patent, with a copy of the plat, as indicated in the preceding section, the claimant is authorized to make his formal application for patent. The instruments usually presented to the register of the land office for filing, and forming a part of the application for the patent, are substantially as follows:—

I. The application for patent.

II. The approved field-notes, to which is usually appended the certificate of the surveyor-general as to *quantum* of expenditures;

III. Copy of the plat;

IV. Certified copies of all location notices, original and amended, upon which the order of survey was based and under which claimant asserts title;

V. Proof of posting on the claim the notice of intention to apply for patent and copy of the plat;

VI. Proof of citizenship of the claimant;

VII. Agreement of the publisher of the newspaper published nearest to the claim, designated by the register as the one in which publication is to be made;

VIII. Abstract of title, or proof of possessory rights where there is no record title;

IX. Three copies of the notice of application for patent, one of which is posted by the register in the local land office, one sent by him to the newspaper for publication, and the third is usually forwarded to the forest officer or government inspector.

X. Where the land is shown by the tract-books to be agricultural, proof of its mineral character.

The application for patent and the accompanying instruments are filed by the register upon the payment of his fees (ten dollars), if the land is clear on the tract-books. Before receiving and filing an application for mineral patent the local officers are directed to be particular to see that it includes no land which is embraced in a prior or pending application.[29] If the land applied for appears from these books to be wholly or in part covered by a previous entry, a homestead filing, or railroad selection, or a prior pending application for mineral patent, or is included within some antecedent reservation or executive withdrawal, the register will decline to receive and file the papers until the obstacle is removed. This, however, is subject to this qualification: As the law recognizes the right of a junior locator to lay his lines over or upon prior patented lands, agricultural or mineral, and over prior unpatented mining claims, the register would not be authorized to refuse to accept the application if it specifically excluded and waived all right to anything embraced within the location which was also included within any other claim, mineral or agricultural, patented or applied for.

Before proceeding with a detailed statement of the contents of the various instruments above referred to, it is advisable to consider the nature of the obstacles which may prevent their filing, and the steps necessary to be taken to remove such impediments.

[29] Min. Reg., par. 44, amended Aug. 9, 1911, 40 L. D. 222, Appendix.

**§ 679. Land embraced within the claim must be clear on the tract-books.**—In previous chapters of this treatise we have discussed generally the subject of public lands and the manner in which rights thereto are acquired under laws other than those applicable to mining claims. It is quite evident that if the land occupies such a *status* as to title as inhibits the initiation of mining rights by location, so long as that *status* is maintained it will be impossible for the land department to consider an application for a mineral patent. That tribunal would not have jurisdiction to issue a patent for lands which are in a state of reservation, or are covered by such a filing or application as operates as a temporary withdrawal of the land from sale or other disposal. Therefore, ordinarily where an entry or selection of public lands is received and recognized by the local officers, it will while pending prevent the receipt or recognition of other applications for the same land until such selection or entry is disposed of.[30] A few illustrations will serve to explain this.

If an inspection of the tract-books discloses that a preliminary homestead filing covers the land applied for by the mineral claimant, the application for patent will not be received;[31] but a citation will be issued, requiring the homestead claimant to appear and show cause why his filing should not be canceled as to the land embraced within the mineral survey. A hearing is then had before the land officers for the purpose of determining the character of the land.[32]

[30] Porter v. Landrum, 31 L. D. 352; Stemmons v. Hess, 32 L. D. 220; Fox v. Mutual M. & M. Co., 31 L. D. 59; Wanda G. M. Co. v. E. F. C. M. & M. Co., 31 L. D. 140.

[31] *Ante*, § 205; Hooper v. Ferguson, 2 L. D. 712; Elda M. & M. Co., 29 L. D. 279.

[32] Rev. Stats., § 2335; 17 Stat. 95; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 49.

The manner of initiating and conducting these proceedings is prescribed by the rules of practice promulgated by the commissioner of the general land office and supplemented by the "General Mining Regulations." [33]

If the land is adjudged to be mineral, a cancellation of the homestead entry, *pro tanto,* is ordered, whereupon the mineral claimant may proceed with his patent application.

The same rule applies where an agricultural claim has passed to final entry but the patent has not yet been issued. The mineral claimant will be compelled to file a verified protest, alleging the mineral character of the land as of a date prior to the final entry,[34] and asking for a hearing to determine the truth of the allegation. If the protest and corroborated proofs accompanying it present facts sufficient to warrant it, a hearing is ordered, and in the meanwhile the agricultural entry will stand suspended. If the protest is sustained, the segregation survey is ordered. The mineral land thus segregated is restored to the public domain and is subject to disposal under the mining laws.

The existence of a pre-emption filing is no bar to the filing of a mineral application; [35] nor is a pending application to purchase under the stone and timber act; [36] but an agricultural claimant has a right to contest the mineral character of the land embraced in the mineral application, and, upon proper protest filed, a hearing will be ordered.[37]

[33] Gen. Min. Reg., pars. 99–111, Appendix; Elda M. & M. Co., 29 L. D. 279.

[34] *Ante,* § 208.

[35] *Ante,* § 205.

[36] *Ante,* § 210.

[37] Devereux v. Hunter, 11 L. D. 214.

Where an application for a mining patent has been once filed with the register, and the applicant proceeds with reasonable diligence to give the required notice, no subsequent application for the same land, nor one which conflicts with a prior application, unless it excludes the area in conflict with the pending application,[38] will be received, so long as the first application remains pending.[39] In other words, the department treats a filed application for a mining patent, properly followed up, as a withdrawal of the land embraced therein.[40]

Applications, however, may be maintained in cases of conflicting surveys or entries where the junior applicant excludes in his application all areas in conflict with pending applications or entries.

[38] Little Annie No. 5 Lode, 30 L. D. 488.

[39] Cain v. Addenda M. Co., 29 L. D. 62; Morgan v. Antlers Park Regent Cons. M. Co., 29 L. D. 114; In re McConaghy, 29 L. D. 226; McCormick v. Night Hawk, 29 L. D. 373; Long John Lode, 30 L. D. 298.

Where, however, a second application has been received inadvertently and proceedings had thereon and an adverse suit filed, the second application will not be rejected, but the proceedings will be stayed pending the outcome of the adverse suit. Wanda G. M. Co. v. E. F. C. M. & M. Co., 31 L. D. 140. An application for a known lode in a placer, patent application for which is pending, cannot proceed beyond the filing until the question of the known existence of the lodes prior to the filing of the placer application is determined. Jawbone Lode v. Damon Placer, 34 L. D. 72.

[40] In re Harriman Lode, Sickles' Min. Dec. 243; Morgan v. Antlers Park Regent Cons. M. Co., 29 L. D. 114; In re Gunnison Crystal M. Co., 2 L. D. 722; Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704; In re Rebellion M. Co., 1 L. D. 542; Aspen Mountain Tunnel Lode No. 1, 26 L. D. 81.

When, because of an incurable fault in the patent proceedings affecting one claim of a group, the application as to that claim is refused, another adverse application may be filed for the rejected tract. Stemmons v. Hess, 32 L. D. 220.

Where an application is offered for a claim within a sixteenth or thirty-sixth section, which has already been identified by a government survey, and which is shown by the surveyor-general's return to have been agricultural in character at the date of survey, the land officers will not accept or file it, as, *prima facie,* the title has passed to the state. Upon an allegation, however, that at the date of such survey the land was in fact known to be mineral, an opportunity will be given to impeach the return. The mineral character of the claim involved must be established by substantive proof, and the usual formal proofs under mineral patent proceedings will not suffice.[41] A hearing will be ordered to determine the facts *as they existed at the time of the survey.* Of this hearing the state must have notice. If the allegation as to the previous known mineral character of the land is established at this hearing, the force of the surveyor's return is destroyed, and the government will deal with the land the same as with any other public mineral land.[42]

If a section 16 or 36 is returned as mineral, application for mineral patent will be received, subject to protest by the state at any time prior to patent, unless it is shown that the state has accepted the surveyor's return as true and selected other lands in lieu thereof.[43]

If the sections have not yet been definitely identified by an official survey, of course, the mineral application will be received, since the right of the state does not

[41] State of S. Dakota v. Walsh, 34 L. D. 723.

[42] For the procedure applicable where the state alleges such land to be mineral in order to secure the right to select lieu land, see Instructions, 34 L. D. 365, 369.

[43] This subject has been fully presented in a preceding chapter. *Ante,* §§ 132–145.

attach until the approval of the government survey of the township.[44]

**§ 680. The application for patent—Its contents.**—As the land department is a special tribunal, charged with the administration of the public land laws, exercising not only executive but judicial powers, an application to obtain a patent addressed to that tribunal should recite all facts necessary to show jurisdiction in the department to convey the particular tract applied for to the particular individual applying for it. In the procedure under the mining laws the "application for patent" bears a close analogy to the initial pleading—declaration, petition or complaint—in a judicial proceeding.[45] While the department may be satisfied with a less formal document, there is no reason why an application for a patent should not contain a recital in ordinary and concise language of the ultimate facts chronologically arranged, which, if tested by the ordinary rules of pleading, would affirmatively show the right of the claimant to the tract. We should outline the contents as follows, the instrument to be addressed to the register and receiver of the land office of the land district wherein the claim is situated:[46]—

[44] State of S. Dakota v. Trinity G. M. Co., 34 L. D. 485; Mahoganey No. 2 Lode, 33 L. D. 37; State of S. Dakota v. Delicate, 34 L. D. 717.

An interesting question arises in California by reason of the passage by its legislature of the act of April 1, 1897 (Cal. Stats. 1897, p. 438), which would seem to be a waiver of claim on the part of the state to such of the sections 16 and 36 as were shown to be mineral in character even after the date of their identification. State of California, 33 L. D. 356.

[45] Stock Oil Co., 40 L. D. 198. It is the means whereby patent proceedings are instituted. Jawbone Lode v. Damon Placer, 34 L. D. 76.

[46] Instances have occurred where a mining claim is bisected by the boundary line between two districts so that the claim is partly in each

(1) The name of the applicant, his place of residence, and postoffice address;[47]

(2) The name of the claim;

(3) The claimant's qualification to receive patent,—i. e., his citizenship, by birth or naturalization;

(4) The *locus* of the claim, district, county, and state, and if upon surveyed lands the section, township, and range; the nature and extent of the claim, making special reference to the approved field-notes attached;

(5) The ownership and possession by the applicant of the claim applied for; (*a*) the date of discovery; (*b*) the date of location; (*c*) the date and place of record of all notices or certificates of location, original or amended, referring to the certified copies accompanying the application; (*d*) general allegation of ownership by mesne conveyances from the original locators, referring to the abstract of title filed with the application; (*e*) compliance with the law as to annual labor, showing the location to be valid and subsisting at the time of filing the application;[48] (*f*) the fact of possession in virtue of a compliance by the applicant (and by his grantors, if he claims by purchase) with the mining rules, regulations and customs of the mining district, state or territory in which the claim lies, and with the mining laws of congress; and where a group of claims is owned by more than one person, such common ownership must be shown to exist in the case of each claim in the group.[49]

district. In such cases there must be an application made in each district for that part of the claim lying therein. When proceedings in both districts are completed, a patent may issue for the entire claim. Alaska Placer Claim, 34 L. D. 40; Foolkiller Lode Claim, 35 L. D. 595.

[47] His age is immaterial. *Ante*, § 225.

[48] Strictly speaking, this is no longer required. *Post*, § 686.

[49] Golden Crown Lode, 32 L. D. 217.

(6) Facts from which the mineral character of the land may be necessarily inferred;[50] the vein or lode must be fully described, the description to include a statement as to the kind and character of mineral, the extent thereof, whether ore has been extracted, and of what amount and value, and such other facts as will support the applicant's allegation that the claim contains a valuable mineral deposit.[51]

(7) The nature, extent, and value of improvements; and if it is sought to credit work done upon one claim for benefit of others in a group, a concise statement of facts from which it may reasonably be inferred that such work is in furtherance of a common system of development; and where a portion only of the claims composing a group are applied for and a common improvement is relied on, the total number of claims in the group, their common ownership, and relative situations should be set forth.[52]

(8) If any rights are asserted by virtue of local rules, the existence of such rules and compliance therewith should be alleged, and duly certified copies should accompany the application; if there are no regulations in force, the fact may be stated;

(9) The fact and date of posting a notice of the application and copy of plat on the premises, referring to the affidavit of such posting accompanying the application.

[50] *Ante*, § 98.

[51] Min. Reg., par. 41, Appendix. By circular letter of June 11, 1909, addressed to the "Registers and Receivers," the commissioner of the general land office held that the requirements of this paragraph should not be construed to mean that the applicant must affirmatively show by proof of exploration that the vein exists in fact throughout the whole length of the claim. All that is required is the existence of a vein in the workings relied on to establish a discovery.

[52] See In re Carretto, 35 L. D. 361, and *ante*, § 673.

(10) If there are conflicts with other claims which are to be excluded from the application, the portions to be excluded should be stated in express terms.[53]

The application is appropriately closed with a request for the issuance of a patent.

A petition or application thus framed presents a foundation for such corroborative evidence as is required by the rules.[54] Properly speaking, as it is required by law to be under oath, it should and probably would be accepted by the land department as supplying everything which the claimant personally is called upon in the first instance to verify. An application so framed should dispense with the necessity for filing separate affidavits of citizenship and other instruments, which under the practice in certain localities are increased and multiplied, in our judgment, uselessly.

Simplicity of procedure is, of course, commendable. We are convinced that the general adoption of the practice herein suggested, which is undoubtedly contemplated by the departmental regulations,[55] and is followed in some localities, will avoid the frequent demands of the land department for additional affidavits or proof of facts which might have been embodied in the preliminary papers.

The land department is never disposed to be extremely technical, and is quite liberal in overlooking minor defects where the good faith of the applicant is apparent. Yet it is a tribunal of great dignity, and

[53] See Min. Reg., par. 38, subd. 4, Appendix. A failure, however, to make the statement of exclusion in the patent application would not enable the applicant to secure patent for such conflict areas if they were in fact excluded in the posted and published notices. Richmond et al. Lode Claims, 34 L. D. 554.

[54] Stock Oil Co., 40 L. D. 198.

[55] Gen. Min. Reg., par. 41, Appendix.

the proceedings by which its jurisdiction is invoked should be conducted fairly on the line of proceedings *in rem* in courts of common-law or equity jurisdiction.[56] A claimant has no right to initiate his proceedings to obtain the ultimate title to his mining claim by the presentation of a mere request for a patent, placing the burden upon the department of examining a number of auxiliary papers for the purpose of ascertaining the origin and basis of his equities and the facts upon which he asserts his rights to a conveyance from the government.

**§ 681. Application by one of several co-owners—Corporations.**—Where a claim is owned by more than one individual, it is customary to select one to act in behalf of all, for which purpose a special power of attorney is executed and filed with the application; but this is not necessary. The practice of the department has been to recognize such an application, signed by one joint owner in behalf of himself and the remaining owners.[57] Unquestionably, an act done by one co-owner for the benefit of all would be presumed to be authorized, or at least ratified.[58]

Where a group of claims is owned by several co-owners, each one must have an interest in each claim, and if one of the co-owners is without any interest in one of the claims, the proceedings as to such claim are a nullity.[59] If the abstract, on the other hand, discloses an outstanding interest in one other than the appli-

[56] Stock Oil Co., 40 L. D. 198.

[57] Ayres v. Daly, 3 Copp's L. O. 196.

[58] Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178, 179, 19 Morr. Min. Rep. 286.

[59] Golden Crown Lode, 32 L. D. 217; Black Lead Lode Extension, 32 L. D. 595.

cant, patent will not issue. He must show title to the whole claim.[60]

Where a claimant alleges ownership of a forfeited interest under the last clause of section twenty-three hundred and twenty-four of the Revised Statutes, the department requires the sworn statement of the publisher of the newspaper as to the fact of publication, giving dates and a printed copy of the notice published, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion. We have heretofore discussed the remedy of the excluded cotenants in such cases.[61]

Where the application is made by a corporation, an officer of the company should be designated by the board of directors or other governing body, by resolution, a certified copy of which resolution should accompany the application.

Where a corporation organized under the laws of one state or territory applies for a patent to a mining claim situated in another, it is required to supply, in addition to a copy of its articles of incorporation filed in the state of its domicile, evidence of its compliance with the law of the state or territory where the claim is situated.[62]

[60] Badger G. M. & M. Co. v. Stockton G. M. & M. Co., 139 Fed. 838, 841. A conveyance of such oustanding interest made to the patent applicant pending patent proceedings is ineffectual, for the entire possessory title must be shown to be in the applicant at the time patent is applied for. Lackawanna Placer Claim, 36 L. D. 36; overruling In re Teller, 26 L. D. 484, and In re Auerbach, 29 L. D. 208. But see In re Ritter, 37 L. D. 715, and In re Squires, 40 L. D. 542, the latter case quoting the Teller case with approval, and intimating that under certain circumstances a defective title may be cured even after application has been filed.

[61] *Ante*, § 646.

[62] In re Alta Millsite, 8 L. D. 195, 197; Hidden Treasure G. & S. M. Co., 16 Copp's L. O. 110; Gold Hill & Lee Mt. M. Co., 16 Copp's L. O. 110.

The right of a corporation to carry on business in a state other than the one from which it receives its charter depends frequently upon its establishing a *status* in such state, by filing evidence of its corporate existence and designating an agent upon whom process may be served. A compliance with these state laws is required by the department to be shown in the patent proceeding.

**§ 682. Verification of application and other proofs.** The law requires the application for patent to be verified by the claimant[63] before some officer authorized to administer oaths within the land district,[64] except where the applicant is not a resident of or within the district at the time of the filing of the application, in which case the application and other required affidavits may be made by a duly authorized agent when such agent is conversant with the facts.[65] This is construed by the department to apply to a case where the applicant is in fact a resident of the land district, but at the time application for patent is made is temporarily absent therefrom.[66]

But verification cannot be made by an agent where the principal is a resident of and within the district.[67]

[63] Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31; Rico Lode, 8 L. D. 223; Min. Reg., par. 41, Appendix.

[64] Rev. Stats., § 2335; 17 Stat. 95; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 49.

[65] Act of Jan. 22, 1880, 21 Stats. at Large, p. 61; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31, amending § 2325, Rev. Stats.

[66] In re Topsey Mine, 7 Copp's L. O. 20.

[67] Crosby et al. Lodes, 35 L. D. 434; El Paso Brick Co., 37 L. D. 155, held that the proceedings could not be validated by a *nunc pro tunc* filing of a valid application, but this procedure was upheld in Stock Oil Co., 40 L. D. 198, and Coalinga Hub Oil Co., 40 L. D. 401, which overruled the earlier cases.

With the exception of affidavits of citizenship and verification of adverse claims in cases of nonresidents, which may be made before the clerk of any court of record of the United States, or of a state or territory, or before any notary public,[68] all affidavits required to be made under the mining laws must be made within the land district, before some officer authorized to administer oaths therein.[69]

Where verification is made before a justice of the peace, the department requires a certificate from the county clerk, showing the official character of the justice and the genuineness of his signature. This certificate need not be attached to every instrument in the set of patent papers verified before that officer. It is sufficient if it is appended to one of them.

**§ 683. Proof of posting of notice and plat on the claim.**—At the time of presenting the application for

[68] Act of April 26, 1882, 22 Stats. at Large, p. 49; Comp. Stats. 1901, p. 1431; 5 Fed. Stats. Ann. 37.

[69] Rev. Stats., § 2335; 17 Stat. 95; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 49. Verification taken by a notary over a telephone held insufficient. Mattes v. Treasury T. M. & R. Co., 33 L. D. 553. See Fairbanks v. Getchell, 13 Cal. App. 458, 110 Pac. 331; Sullivan v. First Nat. Bank, 37 Tex. Civ. 228, 83 S. W. 421. In Lonergan v. Shockley, 33 L. D. 238, it was held that an oath administered in a county by a notary for that county, but outside of the land district, where a part of the county extended into the district, was sufficient. This case was overruled and the doctrine of the text upheld in Mattes v. Treasury T. M. & R. Co. (on review), 34 L. D. 314.

This requirement was held mandatory and jurisdictional in North Clyde Lode Claim, 35 L. D. 455; Mojave M. & M. Co. v. Karma M. Co., 34 L. D. 583; El Paso Brick Co., 37 L. D. 155; but a more liberal doctrine overruling these earlier cases is announced in Stock Oil Co., 40 L. D. 198, and see Coalinga Hub Oil Co., 40 L. D. 401. The secretary of a corporation applicant who is not a stockholder or interested in the property is not disqualified to administer the oath. Milford Metal Mines I. Co., 35 L. D. 174. See, also, *post*, § 736, verification of adverse claims.

patent to the register and receiver, the claimant is required to file therewith the affidavit of two credible witnesses that the plat and notice of application for patent are posted conspicuously upon the claim, giving the date and place of such posting. A copy of the notice so posted must be attached to and form a part of the affidavit.[70]

This preliminary affidavit of posting of the notice and plat upon a mining claim together with the proof of continuous posting and publication correspond in legal effect to the preliminary affidavits and proofs of publication in judicial proceedings where in appropriate cases substituted service has been resorted to.[71]

The secretary has ruled that the *filing* of an affidavit showing the previous posting of both notice and plat on the claim is jurisdictional, and without it all subsequent proceedings are void, even though both notice and plat may have been as a matter of fact posted properly.[72] This hardly seems reasonable, and in view of the more liberal attitude of the department on such questions as expressed subsequently, the applicant would now probably be allowed to supplement his proof *nunc pro tunc*.[73]

§ 684. **Proof of citizenship.**—In the case of an individual, proof of citizenship may consist of his own affidavit thereof.[74] This affidavit must show when and where he was born, and his residence.[75] Where the ap-

[70] Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31; Gen. Min. Reg., par. 40, Appendix.

[71] Stock Oil Co., 40 L. D. 198, 203.

[72] Mojave M. & M. Co. v. Karma M. Co., 34 L. D. 583; followed in El Paso Brick Co., 37 L. D. 155.

[73] Stock Oil Co., 40 L. D. 198.

[74] Rev. Stats., § 2321; 17 Stat. 94; Comp. Stats. 1901, p. 1425; 5 Fed. Stats. Ann. 13.

[75] Gen. Min. Reg., par. 67, Appendix. As to nature of proof which

plicant has declared his intention to become a citizen, or has been naturalized, the affidavit must show the date, place, and the court before which he declared his intention or from which his certificate of citizenship issued,[76] and his present residence. Formerly a certified copy of the act of naturalization was necessary, but this is no longer required. To entitle an applicant who has declared his intention to become a citizen to a mineral patent, it must appear that such intention is a *bona fide* existing one at the time of purchase.[77] An intention to become a citizen may be abandoned before admission to full citizenship.[78]

Where the application is made by one co-owner for the benefit of himself and his cotenants, proof of citizenship of each of them must be furnished.[79]

Where the claimant applies in the capacity of trustee, he must disclose fully the nature of the trust and the name of the *cestui que trust,* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship.[80]

Where the claimant is not the original locator, the department does not require proof of citizenship of such locator or the intermediate grantees. Proof of citizenship of the claimant is sufficient.[81]

is considered legitimate to prove citizenship, see Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. Rep. 375, 36 L. ed. 115; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 645, 19 Morr. Min. Rep. 625.

[76] Gen. Min. Reg., par. 68, Appendix.

[77] Saturday Lode Claim, 29 L. D. 627.

[78] Id.

[79] Min. Reg., par. 67.

[80] Gen. Min. Reg., par. 54, Appendix; In re Capricorn Placer, 10 L. D. 641.

[81] In re Wandering Boy, 2 Copp's L. O. 2; In re Sanford, 1 Copp's L. O. 98; City Rock and Utah v. Pitts, 1 Copp's L. O. 146; *ante*, § 227. In Colorado it is held that in an adverse suit, the citizenship of the original locators, grantors of the patent applicant, must be shown.

In the case of an incorporated company, a certified copy of its charter or certificate of incorporation must be filed.[82]

Under the alien act of March 3, 1887, the land department, where a domestic corporation sought to patent mining claims in the territories, required, in addition to the certificate of incorporation, an affirmative showing that no more than twenty per cent of the stock was held by aliens;[83] but by act of March 2, 1897, the inhibition against alien ownership of stock in such corporations has been repealed, and the *status* of aliens in the territories, with reference to the acquisition of public mineral lands, is now the same in the territories as in the states.[84] Aliens may not acquire unpatented mining claims, but may hold them after patent where such right is not denied by the laws of the respective states.[85]

In the case of an association of persons unincorporated, the affidavit may be made by their duly authorized agent, upon his own knowledge or upon information or belief, setting forth the residence of each person forming such association.[86] The affidavit must

Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 589. This seems to be a strained construction in view of the generally accepted rule that when an alien has conveyed to a citizen, no one can question the validity of a location on the ground of lack of citizenship. See *ante*, §§ 232, 233. See, also, Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 884.

82 Rev. Stats., § 2321; 17 Stat. 94; Comp. Stats. 1901, p. 1425; 5 Fed. Stats. Ann. 13; Gen. Min. Reg., par. 66, Appendix; Clark's Pocket Quartz Mine, 27 L. D. 351; Jackson v. White Cloud G. M. Co., 36 Colo. 122, 85 Pac. 639.

83 In re Gold Hill & Lee. Mt. M. Co., 16 Copp's L. O. 110. See, *ante*, § 244.

84 Opinion of Attorney-General, 28 L. D. 178.

85 *Ante*, §§ 237, 238; Rev. Stats., § 2326; 17 Stat. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann., 35.

86 Rev. Stats., § 2321; 17 Stat. 94; Comp. Stats. 1901, p. 1425; 5

be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application.[87]

Affidavits of citizenship, as heretofore observed,[88] may be taken before any officer authorized by law to administer oaths within the land district. When the applicant is a nonresident of the district, proof may be made before the clerk of any court of record of the United States, or of a state or territory, or before any notary public.[89]

**§ 685. Designation of newspaper—Agreement of publisher.**—The law requires that upon the filing of the patent application the register shall publish a notice that such application has been made, in a newspaper to be by him designated as published nearest to the claim.[90]

The regulations of the department supplementing this statute provide that the register shall publish the notice in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.[91]

As to whether a newspaper is one of general circulation, and is the one published nearest the claim, is determined by the register, and his judgment in this

Fed. Stats. Ann. 13; O'Reilly v. Campbell, 116 U. S. 418–420, 6 Sup. Ct. Rep. 421, 29 L. ed. 669.

87 Gen. Min. Reg., par. 66, Appendix.

88 *Ante*, § 682.

89 Gen. Min. Reg., par. 69, Appendix.

90 Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31.

91 Gen. Min. Reg., par. 47, Appendix.

respect, unless arbitrarily exercised, will be upheld by the department.[92]

But his action in this behalf is subject to review by the commissioner of the general land office, and where the register's action is arbitrary it will be annulled.[93] Geographical or air-line measurements are not necessarily controlling factors.[94] Where two newspapers are published practically the same distance from a claim, the register should select the one calculated to afford the widest publicity in the vicinity, even though its rates may be less reasonable than those of the other paper.[95]

Secretary Smith thus sums up his views of the departmental rulings:—

> The consensus of the rules and decisions seems to be that the notices must be published in an established newspaper, with a *bona fide* circulation in the neighborhood of the claim; one that is printed at the place of its publication and is, in the best judgment of the register, permanently established and recognized by the community, its advertisers, and readers as being a fixture. I take it that newspapers of this character are to be selected in preference to those predatory journals that are frequently found in new localities. . . . . In the exercise of this function the register is clothed with discretion . . . . in the lawful exercise of which he may select a newspaper that he conceives best for the purpose of giving the greatest publicity to the notice, even although

[92] Tomay v. Stewart, 1 L. D. 570; In re Arnold, 2 L. D. 758; Erie Lode v. Cameron Lode, 10 L. D. 655; Condon v. Mammoth M. Co., 15 L. D. 330; Bretell v. Swift, 16 L. D. 178; Pike's Peak et al. Lodes, 34 L. D. 281.

[93] Tough Nut et al. Lode Claims, 32 L. D. 359; see, also, Pike's Peak et al. Lodes, 34 L. D. 281.

[94] See Instructions as to Discretionary Authority of Register, 38 L. D. 131.

[95] In re Tripp, 40 L. D. 190.

it may not be the one nearest the land, and especially would this be true if the one nearest the land, in his opinion, did not meet the requirements as to permanency and general circulation as defined above.[96]

The maximum fees for publication are fixed by departmental regulations.[97] A newspaper exacting extortionate fees is not considered reputable, and orders for publication of notices therein will not be issued.[98] The commissioner is given the power under the law in such cases to designate any paper published in the land district.[99]

While the notice is issued by and published under the direction of the register, neither he nor the government have any concern with the payment of the charges therefor. Therefore the regulations of the department require that before issuing the order for publication the claimant must furnish an agreement signed by the publisher, to hold the applicant for patent alone responsible for the charges of publication.[100] As heretofore indicated, this agreement usually accompanies the application for patent, the register having theretofore informally designated to the claimant the newspaper in which the publication is required to be made.

Neither the law nor the official regulations make it the duty of the local officers, or either of them, to prepare the notice for publication. Its publication is under the direction and supervision of the register; but

[96] Bretell v. Swift (on review), 17 L. D. 558. See, also, Pike's Peak et al. Lodes, 34 L. D. 281.

[97] Rev. Stats., § 2334; 17 Stat. 95; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 49; Gen. Min. Reg., par. 89 (1), Appendix.

[98] In re Steele, 3 L. D. 115.

[99] Rev. Stats., § 2324; 17 Stat. 92; Comp. Stats. 1901, p. 1426; 5 Fed. Stats. Ann. 19.

[100] Gen. Min. Reg., par. 45, Appendix.

it is the duty and privilege of the applicant to see that in such publication there is due compliance with all the essential requirements.[1]

**§ 686. Proof of annual labor.**—At one time the departmental regulations required the claimant on applying for a patent to make a preliminary showing of work and expenditure upon each location sufficient for the maintenance of possession under section twenty-three hundred and twenty-four of the Revised Statutes. This he did either by showing the full amount for the pending year, or, if there has been failure, by showing that he had resumed work so as to prevent relocation by adverse parties.[2] But this requirement no longer obtains.

As we have heretofore observed,[3] the question as to performance or nonperformance of the annual labor is not one in which the government is directly concerned. It only arises in the presence of one claiming under a relocation asserting the noncompliance by the former owner of the claim with the requirements of the law. In other words, it is not necessary to perform the annual labor, except to protect the rights of the locator against parties seeking to initiate title to the same premises.[4] It is not a condition precedent to the

1 Hallett and Hamburg Lodes, 27 L. D. 104.

2 In re Good Return M. Co., 4 L. D. 221, 224; Circ. Instructions, Dec. 14, 1885; 4 L. D. 374; Circ. Instructions, March 24, 1887, 8 L. D. 505.

3 § 624.

4 Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958, 20 Morr. Min. Rep. 591; Barklage v. Russell, 29 L. D. 401, 412; In re Wolenberg, 29 L. D. 302, 304; Marburg Lode Mining Claim, 30 L. D. 202, 206.

In Willett v. Baker, 133 Fed. 937, an adverse suit, the court held that a defendant was not entitled to a judgment establishing his title even where plaintiff's case fails, unless he prove that he did the assess-

obtaining of a patent;[5] nor has the land department anything to do with the determination of the question.[6]

The existing departmental regulations on this subject are clear and concise, and in accordance with these views. There the department says that this question is solely one between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.[7]

**§ 687. The abstract of title—Certified copies of location notices.**—Where the applicant was an original locator, the regulations formerly required him to file a full, true and correct copy of his location notices or certificates, original and amended, if any, as they appeared upon the mining records [such copies to be certified by the officer in charge of the records], together with an affidavit by the applicant that he had not disposed of the claim or any interest therein, but now he is required to file an abstract of title, as are owners by purchase.[8] In all cases now, whether the applicant claims the interests of others associated with him in making the location, or only as purchaser, or as an original locator, he is required to present, in addition to the authenticated copies of the location notices, an abstract of title from the legal custodian

ment work for each year. This is incorrect, for the right of possession does not depend upon performance of annual work except in the presence of an adverse claimant relying on the failure to perform the work for a given year.

[5] Hughes v. Ochsner, 27 L. D. 396, 398; Neilson v. Champagne M. & M. Co., 29 L. D. 491, 493; McEvoy v. Megginson, 29 L. D. 164; Opie v. Auburn M. & M. Co., 29 L. D. 230.

[6] Gaffney v. Turner, 29 L. D. 470, 474; Cleveland v. Eureka No. 1 G. M. & M. Co., 31 L. D. 69, 71; Copper Bullion et al. Lodes, 35 L. D. 27.

[7] Gen. Min. Reg., par. 55, Appendix.

[8] Min. Reg., par. 42, Appendix.

in charge of the records, under his official seal, or by a duly authorized abstracter of titles, brought down to a day reasonably near the date of presentation of the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting or purporting to affect the title to the claim or claims in question appear of record in his office other than those set forth in the accompanying abstract.[9] As soon as practicable thereafter the applicant is required to file a supplemental abstract brought down so as to include the date of filing the application. Publication will not be ordered until the showing as to title is thus completed and the local land officers are satisfied that full title was in the applicant on the day of filing the application. In Alaska, publication will be ordered to proceed on the filing of the main abstract, but the supplemental abstract must be furnished prior to the expiration of the sixty-day period of publication.[10]

In order that an abstract certified to by an abstracter or abstract company may be acceptable, there must have been filed with and approved by the commissioner of the general land office a favorable report of the chief of the field division, or United States district attorney, whose division or district embraces the lands in question, as to the reliability and responsibility of such abstracter or company.[11] The purpose of this abstract is to assure the government that the applicant is lawfully entitled to the possession of the claim.[12]

[9] Id., par. 42 (as amended Jan. 9, 1912, Circular, 40 L. D. 347), Appendix.

[10] Id., par. 42, Appendix.

[11] Id., par. 42, Appendix.

[12] In re Cameron, 4 L. D. 515.

Where a group of locations is claimed by several owners, the abstract must show that each claimant has an interest in each of the locations composing the group.[13] Some of the local land offices have required the abstract to be brought down to the date of entry. There is no justification for this since transfers subsequent to the date of the filing of the application are disregarded,[14] and the patent issues in the name of the applicant even if he should die pending patent proceedings.[15] The only case where an abstract can properly be required to cover a date later than the date of application is where instruments have been placed of record subsequently thereto for the purpose of curing defects in applicant's title.[16]

Proceedings to secure a patent by one without interest in or control over the lands applied for are a nullity.[17] The full ownership must be shown to be in the applicant.[18] At various periods the land department has taken different views regarding the acquisition of outstanding interests pending patent proceedings,[19] but the latest expressions of opinion would seem to permit such acquisitions for curative purposes.[20]

Where the records are lost or destroyed, secondary evidence of their contents may be shown, the proper

13 Golden Crown Lode, 32 L. D. 217.

14 Liddia Lode M. Claim, 33 L. D. 127; Gen. Min. Reg., par. 71, Appendix.

15 Woodman v. McGilvary, 39 L. D. 574; In re Graham, 40 L. D. 128, overruling Tripp v. Dunphy, 28 L. D. 14.

16 In re Ritter, 37 L. D. 715; In re Squires, 40 L. D. 542.

17 Extra Lode Claim, 34 L. D. 590.

18 Repeater et al. Lodes, 35 L. D. 54; see, also, Badger G. M. & M. Co. v. Stockton G. M. Co., 139 Fed. 838, 841.

19 Lackawanna Placer Claim, 36 L. D. 36, held that this was not permissible, overruling In re Auerbach, 29 L. D. 208, and In re Teller, 26 L. D. 484.

20 In re Ritter, 37 L. D. 715; Woodman v. McGilvary, 39 L. D. 574; In re Squires, 40 L. D. 542.

foundation being laid therefor, and the claimant may make proof of possessory title. This proof may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession and improvements, and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.[21]

**§ 688. Proof of title by possession, without location under section twenty-three hundred and thirty-two of the Revised Statutes.**—Section twenty-three hundred and thirty-two of the Revised Statutes provides that where a person or association of persons and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent in the absence of any adverse claim. This is but a re-enactment of section thirteen of the placer law of July 9, 1870.[22]

It would seem to recognize the doctrine that as against everyone save the United States, the title to a mining claim may be acquired by possession, user and enjoyment for a period equal to the time prescribed by the statute of limitations.[23]

[21] Gen. Min. Reg., par. 43, Appendix.

[22] This provision, although originally enacted as a part of the placer act of 1870, applies to lode claims as well. Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1051, 22 Morr. Min. Rep. 610.

[23] Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1051, 22 Morr. Min. Rep. 610.

As was said by the late Judge Sawyer,—

> It was the intention of congress to give the right of purchase of a mining claim . . . . to the person or association of persons who, in pursuance of the laws of the state or territory and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner, and entitled to the possession as against everybody except the government of the United States. . . . . The party who at the time can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs and regulations, is the party upon whom congress intended to confer the right to purchase, no matter how that right originated, if under such laws, customs and decisions of the courts he has the present right.[24]

Such a continued adverse holding would seem to give the possessor a prescriptive right to the premises that would avail against anyone seeking to initiate a new claim to the same property, in fact, against all save the government.[25]

In construing section forty-five of the Philippine mining act of July 1, 1902,[26] the supreme court of the United States held that it was similar to section twenty-three hundred and thirty-two, and in answer to the argument that section forty-five of itself confers no right other than to apply for a patent, it stated that a right to an instrument that will confer title to a thing is a right to have the thing.[27]

[24] 420 M. Co. v. Bullion M. Co., 3 Saw. 634, 645, Fed. Cas. No. 4989, 11 Morr. Min. Rep. 608. See, also, Stewart v. Rees, 21 L. D. 446; Armstrong v. Lower, 6 Colo. 581, 15 Morr. Min. Rep. 458; Kinney v. Cons. Virginia M. Co., 4 Saw. 382, Fed. Cas. No. 7827.

[25] Walsh v. Erwin, 115 Fed. 531, 537. See, also, Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1051, 22 Morr. Min. Rep. 610; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 283.

[26] 32 Rev. Stats. 691.

[27] Reavis v. Fianza, 215 U. S. 16, 25, 30 Sup. Ct. Rep. 1, 54 L. ed. 72.

One may therefore enter upon public land without location, and if the extent of his possession is defined, his holding adverse against all the world save the government, and his working of the claim be such for the required period as will indicate a continuous possession and user, he may apply for a patent, basing his right upon such possession and user.

Or one may enter under a deed describing the boundaries of the claim, his grantor being without title. Such entry will be under color of title, and his possession will in time ripen into such a right as will authorize the government to issue its patent, although no location was ever made.[28]

Or one may enter under a location which is insufficient under the mining statutes, and the possession so taken may, if openly and notoriously held and the claims worked for a sufficient period, clothe the possessor with a right which will be recognized by the government,[29] but such possession, in order to vest a title under the statute of limitations, must be open, notorious, exclusive and continuous, and not loose, uncertain, scrambling and mixed.[30] Any interruption of the adverse possession within the required period prevents the acquisition of title by this method.[31] The acts of mining should not be merely occasional, fugi-

The court further held that if this objection had been raised earlier the plaintiffs might or might not have been turned over to another remedy and left to apply for a patent.

28 Harris v. Equator M. & S. Co., 8 Fed. 863, 3 McCrary, 14, 12 Morr. Min. Rep. 178; Lebanon M. Co. v. Cons. Rep. M. Co., 6 Colo. 371, 381.

29 Jones v. Prospect Mountain T. Co., 21 Nev. 339, 31 Pac. 642.

30 Hamilton v. Southern Nevada G. & S. M. Co., 13 Saw. 113, 116, 33 Fed. 562, 564, 15 Morr. Min. Rep. 314; Humphreys v. Idaho Gold M. D. Co., 21 Idaho, 126, 120 Pac. 823, 827.

31 Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301, 306.

tive and desultory, but as continuous as the nature of the business and customs of the country permit and require.[32]

The land department has construed a compliance with the provisions of this section as sufficiently establishing the location of the claim and the applicant's right thereunder "in the absence of any adverse claim," and the operation of the provisions of said section is not confined to cases where the applicant is unable, by reason of lapse of time or the loss of mining records by fire or otherwise, to furnish proof of possessory title required by the mining laws.[33]

In other words, the fact that the applicant can show title deraigned through a recorded original location does not prevent him from also claiming title by prescription. If he have a record title, he is not compelled to produce it or rely upon it, provided his title by prescription is complete.[34]

Strictly speaking, in a legal sense one cannot acquire title to an unpatented mining claim by prescription or adverse possession. The statute of limitations does not commence to run until the issuance of patent.[35]

The adverse holding under section twenty-three hundred and thirty-two, Revised Statutes, is simply the showing of an uninterrupted possession for the period of time prescribed in the statute which is held to be the equivalent of a location. Where the validity of a location has remained unchallenged for five years

32 Stephenson v. Wilson, 37 Wis. 482, 13 Morr. Min. Rep. 408. See, also, Wilson v. Henry, 35 Wis. 241, 1 Morr. Min. Rep. 152; Moore v. Thompson, 69 N. C. 120, 1 Morr. Min. Rep. 221; Colvin v. McCune, 39 Iowa, 502, 1 Morr. Min. Rep. 223.

33 Little Emily M. & M. Co., 34 L. D. 182; Capital No. 5 Placer M. Claim, 34 L. D. 462.

34 Capital No. 5 Placer M. Claim, 34 L. D. 462.

35 Tyee Cons. M. Co. v. Langstedt, 136 Fed. 124, 125, 69 C. C. A. 548; Tyee Cons. M. Co. v. Jennings, 137 Fed. 863, 865, 70 C. C. A. 393.

(the period of the statute of limitations), the presumption arises of a discovery of mineral and a valid location,[36] i. e., as against one seeking to acquire the same or part of the same area.

It has been contended that section twenty-three hundred and thirty-two of the Revised Statutes only applies where the applicant is not adversed in the land office, and that in the presence of an adverse claimant who has made a location over the occupancy of the applicant, the possession without location, howsoever long continued, must yield to the one properly locating, and this view seems to be favored by the supreme court of Montana [37] and by the supreme court of Colorado;[38] but the supreme court of the United States, in the case of Belk v. Meagher, has said that if a claimant actually holds possession and works the claim for the requisite period of time under the local statute of limitations, his right to patent is complete.[39] Such possession and working is the equivalent of a valid location.[40] The supreme court of California has reannounced the doctrine in Altoona Q. M. Co. v. Integral Q. M. Co.[41]

[36] Vogel v. Warsing, 146 Fed. 949, 951, 77 C. C. A. 199.

[37] McCowan v. Maclay, 16 Mont. 234, 40 Pac. 602, 604.

[38] Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59, 60, 21 Morr. Min. Rep. 284. Doctrine cited *arguendo*, Bismark Mt. G. M. Co. v. North Sunbeam, 14 Idaho, 516, 95 Pac. 14.

[39] 104 U. S. 279, 287, 26 L. ed. 735, 1 Morr. Min. Rep. 510. Quoted in Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1051, 22 Morr. Min. Rep. 610; S. C., in error, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119. Principle cited and applied to the Philippine Mining Act. Reavis v. Fianza, 215 U. S. 16, 22, 30 Sup. Ct. Rep. 1, 54 L. ed. 72.

[40] Id.

[41] 114 Cal. 100, 105, 45 Pac. 1047, 1049, 18 Morr. Min. Rep. 410. Doctrine cited *arguendo*, Bismark Mt. G. M. Co. v. North Sunbeam, 14 Idaho, 516, 95 Pac. 14, 19. See, also, Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 576, 22 Morr. Min. Rep. 276; Risch v. Wiseman, 36 Or. 484, 78 Am. St. Rep. 783, 59 Pac. 1111, 20 Morr. Min. Rep. 409; Walsh v. Erwin, 115 Fed. 531, 536.

The supreme court of New Mexico, in an elaborate discussion of the effect of this statute, cites the Altoona and Belk-Meagher cases approvingly, holding that a party who has done work for the statutory period occupies the *status* and possesses the rights of a locator—no more and no less.[42]

This decision of the New Mexico court is commented on with approval by the supreme court of Idaho, which says that the great weight of authority is in favor of the rule announced in the Altoona case, and that section twenty-three hundred and thirty-two is intended to obviate the necessity for proof of posting and recording a notice of location, and the adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs are furnished by the county records.[43]

In a previous article we have announced the rule that naked occupancy of the public mineral lands confers no title,[44] and that such occupancy must yield to one who in good faith and without force or violence enters upon the ground and perfects a valid location.[45] This doctrine is, however, subject to the qualification that the possession and user has not by operation of the statute of limitations ripened into a title which is the equivalent of a location.

[42] Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 284. In this case the contention was made that when the ground had been possessed and worked for the statutory period, it was no longer incumbent on the owner to perform annual labor. The court refused to countenance this view. However, it weakens its approval of the rule announced in the Altoona case by stating that when applicant's occupancy has been proven, "if there be no adverse claimant," this is sufficient to establish a right to a patent.

[43] Humphreys v. Idaho G. M. D. Co., 21 Idaho, 126, 120 Pac. 823, 826, 827.

[44] *Ante*, § 216.

[45] *Ante*, § 218.

The land department at one time held that the statutory expenditure of five hundred dollars as a prerequisite to the issuance of a patent is not required where the claimant bases his right upon section twenty-three hundred and thirty-two of the Revised Statutes;[46] but subsequently reversed its ruling.[47]

To enable an applicant to avail himself of the privileges conferred by the section of the Revised Statutes under consideration, the land department has established rules for his guidance, which dispense with the necessity of producing evidence of location, copies of conveyances, or abstracts of title.[48] He is required, in lieu thereof, to furnish a certified copy of the statute of limitations affecting mining claims (real estate) for the state or territory,[49] together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title and the continuation of his possession of the mining ground covered by his possession, stating the area thereof and the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so when the same ceased; whether such cessation was caused by com-

[46] In re Sears, 8 Copp's L. O. 152. See, also, Stewart v. Rees, 21 L. D. 446.

[47] Barklage v. Russell, 29 L. D. 401; Capital No. 5 Mining Claim, 34 L. D. 462.

[48] Humphreys v. Idaho G. Mines Dev. Co., 21 Idaho, 126, 120 Pac. 823, 826.

[49] We do not clearly see why the department should not take judicial cognizance of the statutes of a state or territory wherein the claim applied for is situated. On writ of error issued out of the supreme court of the United States to the highest court of a state, the former tribunal takes judicial notice of all state legislation of a public character, and we do not see why an analogous rule should not apply to the land department in the administration of the public land laws within a particular state.

promise or by judicial decree, and any additional facts having a direct bearing upon his possession and good faith which he may desire to submit in support of his claim.[50]

The facts narrated by the claimant relative to his possession, occupancy and improvements must be supported by corroborative affidavits of disinterested persons of credibility, who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.[51]

The claimant is also required to file a certificate under the seal of the court having jurisdiction within the judicial district or county wherein the claim is situated, showing that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the state or territory other than that which has been finally decided in favor of the claimant.[52]

As a matter of course, a survey must be made of the claim the same as in other cases. The application for an order of survey, instead of being based upon a recorded location, would necessarily present substantially the same facts as are required to be proved before the register. A narrative of facts which would be sufficient to give the register jurisdiction to pass the application to final entry would certainly suffice as the basis for an official survey.

50 Gen. Min. Reg., par. 75, Appendix.

51 Id., par. 77, Appendix.

52 Id., par. 76, Appendix.

One basing his right to a patent on the ground that he has held the claim for a period which satisfies the statute of limitations of his state or territory must proceed to obtain his patent the same as if his right rested on location, with the exception of the manner by which he proves his title.[53]

**§ 689. Proof of mineral character of the land.**—The government is a party in interest in every case involving the disposal of the public lands, and when such lands are sought to be acquired under any of the public land laws, it is not only within the power, but it is the duty, of the land department to see that the lands are disposed of according to law and not in violation of the law. Public lands cannot be lawfully located or patented under the mining laws for purposes and uses foreign to those of mining, and if it can be shown that claims sought to be patented as mineral lands were not located in good faith for mining purposes, such claims will be held fraudulent from their inception.[54] It is a rule of the land department that the only tracts of public land which will be withheld from entry under the agricultural land laws are those which have been returned by the surveyor-general as mineral.[55]

We have heretofore observed that the return of the surveyor-general determines the *prima facie* character of the land. If the lands are not returned as mineral, the presumption obtains that they are agricultural in character and cannot be entered under the mining laws

[53] In re Smith Brothers, 7 Copp's L. O. 4.

[54] Grand Canyon Ry. Co. v. Cameron, 36 L. D. 66. This case denied the right of a patent sought for mining locations covering trails into the Grand Canyon of the Colorado and which would have been used for hotel purposes, control of water supply, etc.

[55] Gen. Min. Reg., par. 100, Appendix.

until the return is contradicted.[56] Therefore, where a claimant applies for a tract of land under the mining laws which is borne upon the official records as agricultural, proof should be furnished of its mineral character sufficient to overcome the force of the surveyor-general's return. And as we have noted heretofore,[57] the land department now requires detailed proof of the kind, character and extent of the mineral deposit to be incorporated in the patent application papers.

It has been said that when a valid mineral location has been made, the slight presumption in favor of the surveyor-general's return is negatived, and that the burden of proof thereupon shifts to the party attacking the mineral claim; but as no valid location can be made, except upon a discovery, the fact of such discovery should be established, and such statements verified by the oath of the claimant should be presented, from which the legal inference necessarily flows that the lands are of the character claimed. A mere location certificate will not be sufficient.[58]

We have heretofore fully defined the character of lands which fall within the designation of mineral.[59] If the tract applied for is claimed in good faith to be mineral in character, and subject to entry under the mining laws, there should be no difficulty in succinctly stating the facts suggested in the rule laid down in section ninety-eight of this treatise. This proof, in the absence of a protest interposed by an agricultural claimant, will be sufficient to enable the officers of the land department to pass the entry.

In the presence of a protest, however, its function is limited to shifting the burden of proof to the protest-

[56] *Ante*, § 106.
[57] *Ante*, § 680.
[58] Id.
[59] *Ante*, § 98.

ant. Such protest necessitates a hearing, which is conducted under the departmental regulations.[60]

Where the lands are returned and borne upon the tract-books as mineral, the burden is fixed by law upon the agricultural claimant,[61] and the preliminary proof on behalf of the mineral claimant herein suggested is not so essential. Nevertheless, as heretofore indicated,[62] the application should show affirmatively the right of the claimant to enter the tract applied for. It is customary and advisable to fortify the proof of claimant with corroborative affidavits of disinterested parties.

The failure to prosecute an application for a mining patent with reasonable diligence after, upon contest, the land has been held to be mineral or the failure of the mineral applicant to perform annual assessment work on the claim cannot be taken advantage of by a claimant under the agricultural land laws, but only by a mineral claimant who, after such failure and before resumption of work, relocates the land according to the mining laws.[63]

In the case of a hearing to determine the mineral or nonmineral character of the land theretofore held by the department to be principally valuable for its mineral deposit, the burden of proof is with the agricultural claimant, and it is incumbent on him to clearly overcome the effect of the former decision.[64]

**§ 690. Publication of the notice, and proof thereof.** Upon the filing of the application with the accompanying preliminary proofs, if no reason appears for reject-

60 Gen. Min. Reg., pars. 99–111, Appendix.
61 Richter v. State of Utah, 27 L. D. 95; *ante*, §§ 106, 207.
62 *Ante*, § 680.
63 Coleman v. McKenzie, 29 L. D. 359.
64 Coleman v. McKenzie, 29 L. D. 359.

ing the application, the register is required to publish a notice, for the period of sixty days,[65] in the newspaper designated by him, as the one published nearest the claim.[65a] This notice should be a counterpart of the one posted on the claim, or at least substantially conform to it.[66] Its requisites and contents have been fully outlined in a previous section,[67] and it is unnecessary to repeat what was there said. In the language of the regulation, it must embrace all the *data* given in the notice posted upon the claim.[68] The published and posted notices of application for patent constitute "process" in this procedure under the mining laws.[69] Applicants are admonished that too much care cannot be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend in a great measure the regularity and validity of the whole proceeding.[70] The primary purpose of the publication of the notice is to bring the application to the attention of persons who may have adverse interests, in order that they may have a chance to protect them.[71] The published notice should be taken as a whole, and if it does not appear to have sufficient and correct data to put persons of ordinary intelligence and prudence "upon inquiry"

65 Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31.

65a *Ante*, § 685.

66 Reed v. Bowron, 32 L. D. 383.

67 *Ante*, § 677.

68 Gen. Min. Reg., par. 46, Appendix.

69 Stock Oil Co., 40 L. D. 198, 203.

70 Id., par. 39. See, also, Sulphur Springs Q. M. Co., 22 L. D. 715. A patent once issued, however, is voidable and not void where there was a material error in the published notice on which it was based, and until vacated by appropriate judicial proceedings is in full force and effect, and the land is beyond the jurisdiction of the land department. Sinott v. Jewett, 33 L. D. 98.

71 Tough Nut et al. Lode Claims, 32 L. D. 359.

and to enable anyone interested to ascertain with accuracy the position of the claim, it fails to comply with the requirements of the statute and the mining regulations.[72]

This notice must be signed by the register, and the department holds him responsible for its proper publication.[73] Where errors are discovered, and a new publication is for that reason ordered, he is required to pay the cost thereof.[74]

The register, however, has no responsibility for the notice posted by the claimant on the claim. This is usually prepared by the attorney for the applicant, who also prepares and submits to the register its counterpart for publication. In such cases the claimant takes the risk and assumes the responsibility.

When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary, the first day of issue being excluded from the computation.[75]

When in a *daily,* the notice must appear in each issue for sixty-one consecutive issues, the first day of issue also being excluded in estimating the period of sixty days.[76] It must appear in every copy of the paper of each issue published during the period,[77] and a weekly publication in a paper which is issued tri-weekly is not sufficient.[77a]

72 Reed v. Bowron, 32 L. D. 383.

73 Becker v. Sears, 1 L. D. 575; In re Mimbres M. Co., 8 L. D. 457.

74 In re Payne, 15 Copp's L. O. 97.

75 Gen. Min. Reg., par. 45, Appendix; Davidson v. Eliza G. M. Co., 28 L. D. 224; S. C., on review, 28 L. D. 550; Opie v. Auburn G. M. Co., 29 L. D. 230; Tenderfoot Lode, 30 L. D. 200.

76 Gen. Min. Reg., par. 45, Appendix; Eureka M. Co. v. Jenny Lind M. Co., Copp's Min. Dec., 169, 170; Jefferson M. Co. v. Pennsylvania M. Co., 1 Copp's L. O. 66.

77 In re American Flag Lode, 6 L. D. 320.

77a J. C. S. Mining Co., 41 L. D. 369.

As to what is meant by the "period of publication" within which adverse claims must be filed under section twenty-three hundred and twenty-six of the Revised Statutes will be considered when we reach the subject of adverse claims.[78]

A substantial defect in the notice as published will necessitate a republication, which must include posting on the claim and in the register's office.[79]

If any of the three notices required in the patent proceeding are insufficient, they are all rendered valueless.[80]

When the period of publication has expired, proof of such publication in the form of a sworn statement from the office of the publication must be filed with the register. This statement should show that the notice was published for the statutory period, giving the first and last day of such publication.[81]

**§ 691. The posting of the notice in the register's office, and proof thereof.**—In addition to the notice of application for patent required to be posted on the claim and published, a third notice must be posted in the register's office.[82] This notice must be in all respects similar to the one posted on the claim and pub-

[78] *Post*, § 738.

[79] In re American Flag Lode, 6 L. D. 320. We do not interpret this decision as requiring a new posting on the land and in the register's office. If the notices as originally posted are correct and remain posted during the period of republication, every legitimate requirement is complied with, and no good reason could be subserved by requiring a reposting. Of course the affidavits of continuous posting on the ground and in the register's office must embrace the period of republication where one is required.

[80] Gross v. Hughes, 29 L. D. 467.

[81] Gen. Min. Reg., par. 51, Appendix.

[82] Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31; Gen. Min. Reg., par. 45, Appendix.

lished, thus making three concurrent or complementary methods of giving notice. One is just as necessary as the other,[83] a substantial defect in one vitiates all, and all must cover the full period of publication,—to wit, the sixty days.[84]

Where, during any part of this period, the register's office is closed, the time it remains closed must be deducted, and the time of publication and posting on the ground must be prolonged to compensate for it, or publication and posting must be commenced *de novo*.[85]

Where there is a change in the boundaries of the land district during the period, so that the office wherein the notice was originally posted ceases to have jurisdiction over the land, such jurisdiction being transferred to another office, the posting must be continued and completed in the latter, otherwise republication and reposting will be required.[86]

Where the land sought to be entered lies in two land districts, the department requires an application for patent to be filed in each district for that part of the claim lying therein, and, of course, posting must take place in the land offices of both districts.[87]

The register is required, in transmitting the papers to the commissioner of the general land office, to certify that the notice was posted in his office for the full period of publication, such certificate to state distinctly when such posting was done and how long continued.[88] Should he fail to do so, the applicant may procure other

83 Gross v. Hughes, 29 L. D. 467.

84 Tilden v. Intervenor M. Co., 1 L. D. 572.

85 Id.

86 In re Williams (on review), 17 L. D. 282.

87 Alaska Placer Claim, 34 L. D. 40; Foolkiller Lode Claim, 35 L. D. 595.

88 Gen. Min. Reg., par. 73, Appendix.

satisfactory evidence of the register's compliance with the law.[89]

**§ 692. Proof that the plat and notice of application for patent remained posted on the claim during the period of publication.**—At the expiration of the sixty days of publication the claimant is required to file his affidavit, showing that the plat and notice have remained posted in a conspicuous place on the claim during such period of publication, giving the dates.[90] An affidavit by an outsider who is not interested in the claim or who has not been appointed attorney in fact by an absent applicant will not be satisfactory. In the case of a corporation applicant this affidavit should be made by its duly authorized agent appointed to apply for patent, in the absence of an appropriate designation of any other person.[91] The affidavit should refer to the one on file in the register's office, showing when and where the notice was posted originally,[92] so that the two taken together will show continuous posting between the dates mentioned, covering the period of publication, and that the notice remained during that period where it was originally placed.

The affidavit of continuous posting may be properly made by a claimant whose knowledge of the fact is derived from personal observation, at various times, of the plat and notice as posted, and from such information with respect thereto as would be accepted by a reasonably cautious man.[93]

89 In re Mimbres M. Co., 8 L. D. 457, 460.

90 Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31; Gen. Min. Reg., par. 51, Appendix.

91 Joalinga Hub Oil Co., 40 L. D. 401.

92 *Ante*, § 683. See, also, In re Prince of Wales Lode, 2 Copp's L. O. 2.

93 Bright v. Elkhorn M. Co., 9 L. D. 503, 507; Tangerman v. Aurora Hill M. Co., 9 L. D. 538.

§ 693. **Statement of fees and charges.**—In order that the department may exercise a wholesome supervision over the subject of fees charged by the various persons whose services are necessarily required in the conduct of patent proceedings, the claimant is called upon, before making final entry, to file with the register a sworn statement of all charges and fees paid by the applicant for publication and surveys, together with all fees and money paid the register and receiver of the land office, which statement is transmitted with the other papers in the case to the commissioner of the general land office.[94]

§ 694. **Application to purchase.**—All the antecedent proceedings having been regular, the proofs of compliance with the law satisfactory, and neither adverse claim nor protest having been filed, the applicant is permitted to make final entry. To accomplish this he is required to present to the register and receiver a formal application to purchase,[95] describing the premises by name and survey number, by which the survey is designated by the surveyor-general, accompanied by the purchase price of the land at the rate of five dollars per acre. Upon receipt of the purchase price, the receiver issues a duplicate receipt therefor, and the entire record in the case is forwarded to the commissioner of the land office for his inspection and approval.[96]

§ 695. **Résumé.**—In ordinary cases the steps required to be taken by an applicant for mineral patent,

[94] Rev. Stats., § 2334; 17 Stat. 95; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 49; Gen. Min. Reg., par. 52, Appendix.

[95] No verification is required.

[96] Gen. Min. Reg., par. 52, Appendix.

and the instruments required to be filed with the register of the land office in the course of patent proceedings subsequent to the completion and approval of the survey, may be divided into two classes, preliminary and final, and may be thus scheduled:—

*Preliminary:—*

(1) The applicant is required to post upon the claim a copy of the plat and a notice of application for patent.

There must then be presented to the register of the land office the following instruments:—

(2) Application for patent;

(3) The approved field-notes;

(4) Copy of the official plat;

(5) Certified copies of notices or certificates of location, original and amended (if any);

(6) Proof of posting notice and plat on claim;

(7) Proof of citizenship;

(8) Form of notice of application for patent to be signed by the register and posted in his office;

(9) Form of notice of application for patent to be signed by the register and published;

(10) Form of notice of application for patent for the government inspector or forest officer.

(11) Agreement of publisher;

(12) Proof of mineral character of land;

(13) Abstract of title.

*Final:—*

(14) Proof that notice and plat remained posted on the claim during the period of publication;

(15) Proof of publication;

(16) Statement of fees and charges;

(17) Application to purchase.[97]

**§ 696. Applications for patent once instituted must be prosecuted with reasonable diligence—Relocations pending patent proceedings.**—The mining laws contemplate that proceedings under an application for mineral patent shall be diligently prosecuted to completion.[98] The departmental decisions on the subject are notice to the world, and mineral applicants must govern themselves accordingly or suffer the consequences.[99]

The land department at one time applied the criterion of a "reasonable period" to the completion of such proceedings, and held that a failure to comply with this rule constituted a waiver of rights secured under the application.[100]

Later, however, the necessity arose for a more definite rule applicable to cases where relocations of the claims applied for had been made by hostile claimants prior to the attempt of applicant to complete his entry.

The department announced the rule that where an applicant for patent for a mining claim, after the expiration of the period of publication of notice of application, voluntarily defers making entry until the close of the calendar year in which the period of publication ends, and where there is no obstacle or barrier to pre-

97 Suggested forms of the foregoing instruments will be found in the Appendix.

98 In re Squires, 40 L. D. 542, 546; Gen. Min. Reg., par. 56, Appendix.

99 Copper Bullion etc. Lodes, 35 L. D. 27.

100 Gain v. Addenda M. Co. (on review), 29 L. D. 62; In re Wolenberg, 29 L. D. 302; Scotia M. Co., 29 L. D. 308; Barklage v. Russell, 29 L. D. 401; Reins v. Montana Copper Co., 29 L. D. 461; Homestake M. Co., 29 L. D. 689; Marburg Lode Claim, 30 L. D. 202; Little Annie No. 5 Lode Claim, 30 L. D. 488.

vent the completion of the patent proceedings, his negligence, in the presence of a relocation of the claim after the termination of that year, is fatal to the entry.[1]

This rule is based on the reason that a failure to perform assessment work during any calendar year renders the claim subject and liable to relocation, and if the patent applicant fails to make entry and acquire the equitable title which results, the pendency of patent proceedings does not suspend or excuse the performance of annual labor,[2] and in the presence of an alleged subsequent adverse location, the applicant must be remitted to his original situation and compelled to institute patent proceedings anew, so that the adverse claimant may have his day in court.[3]

The principle is the same whether only a day or several months elapse between the end of the publication period or the termination of adverse proceedings or protest and the end of the then current calendar year.[4] The department will not entertain any showing on the part of the patent applicant that the annual expenditure has been properly performed, since this is not a matter for the legitimate consideration of the land department.[5] Where the local officers, upon a showing

1 Cleveland v. Eureka G. M. & M. Co., 31 L. D. 69; Surprise Fraction et al. Lodes, 32 L. D. 93; Lucky Find Placer Claim, 32 L. D. 200; Copper Bullion etc. Claims, 35 L. D. 27; Woodman v. McGilvary, 39 L. D 574; In re Squires, 40 L. D. 542.

2 See *ante*, § 632; *post*, § 731.

3 Lucky Find Placer Claim, 32 L. D. 200. See, also, Ring v. Montana Loan & Realty Co., 33 L. D. 132. The department has held where a patent application has remained dormant for a considerable length of time after publication was complete, that there may be a new publication and a new posting without necessity for filing a new application. Open Door Lode & Millsite (unreported).

4 Id. As to the necessity of performing annual labor during the pendency of a protest or adverse claim, see *ante*, § 632.

5 Copper Bullion etc. Claims, 35 L. D. 27.

deemed sufficient by them, have allowed an entry, although not made within the calendar year, and there is no intervening adverse claim, the entry will not be canceled.[6] This modification of the rule applies only to *ex parte* cases, and in other than *ex parte* cases, the cancellation of the entry is imperative to protect the intervening locator's rights which could not have come into being except for the laches and delay of the applicant for patent.[7] Should there be no new application for patent, the relocator has his remedy in the courts.[8]

This remedy is likewise available to him, even if the patent application is not dismissed. Although as a rule the land department does not concern itself with litigation pending in the courts which has no direct relation to adverse proceedings instituted during the period of publication, yet where there has been a relocation after the expiration of that period, and the relocator invokes the aid of the courts in maintaining his rights, the land department will not ignore or disregard the results of the litigation, and if in favor of the relocator, it will cancel the patent application.[9]

As a rule, the only judicial proceedings in which a claim may become involved resulting in delay which would otherwise be fatal to entry and which will protect the rights of the patent applicant during pendency of the proceedings, are those arising under the mining laws themselves, whereby the applicant is prevented

[6] Woodman v. McGilvary, 39 L. D. 574.

[7] Id., which also holds that one relocating pending patent proceedings may protest, but has no right of appeal. But see Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 788, which states that a protest under such circumstances would not receive any consideration whatever from the land department.

[8] Gillis v. Downey, 85 Fed. 483, 489, 29 C. C. A. 286; Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 787.

[9] Cain v. Addenda M. Co. (on review), 29 L. D. 62.

from completing his patent proceedings prior to final determination of litigation.[10]

**§ 697. Effect of dismissal of patent application.**—An application for patent is not essential to the acquisition or maintenance of a mining claim.[11] Such being the case, it follows that the abandonment of such an application leaves the title to the land and the right to possess the same, and to extract the minerals therefrom just where they would have been if no application for patent had been made.[12]

The fact that the entry was canceled would not of itself render the ground subject to relocation. The original location of the lode is not affected by the cancellation, and the owner could still hold the claim under his possessory right so long as there was a compliance with the law.[13]

The decision of the land department canceling a patent application is not *res judicata.* It is equivalent to nothing more than a judgment of nonsuit, and is not conclusive on the department itself or upon the parties.[14]

Where an entry has been canceled or refused by reason of a failure to comply with regulations affecting

[10] Laughing Water Placer, 34 L. D. 56.

[11] As to the power of the department to conduct an investigation into the validity of a location where there is no patent application pending, see *ante,* § 664.

[12] Coleman v. McKenzie, 29 L. D. 359; Beals v. Cone, 27 Colo. 473, 483. 83 Am. St. Rep. 92, 62 Pac. 948, 951, 20 Morr. Min. Rep. 591; McKnight v. El Paso Brick Co., 16 N. M. 721, 120 Pac. 694.

[13] McGowan v. Alps Cons. M. Co., 23 L. D. 113; Clipper M. Co., 22 L. D. 527.

[14] Clipper M. Co. v. Eli M. & L. Co., 29 Colo. 377, 93 Am. St. Rep. 89, 64 L. R. A. 209, 68 Pac. 286, 288 (following Beals v. Cone, *supra*); S. C., on appeal, 194 U. S. 220, 223, 24 Sup. Ct. Rep. 632, 48 L. ed. 944; Clipper M. Co. v. Eli M. & L. Co., 33 L. D. 660; S. C., on review, 34 L. D. 401.

the patent proceedings subsequent to the date of the filing of the application, the applicant may commence publication and posting *de novo,* and in lieu of filing a new application for patent may refile the original application, or the new application will date from the first publication of notice of the renewed application. In the meantime the application is not treated as "pending." [15]

## Article II. Placer Claims—Lodes Within Placers.

§ 699. Proceedings to obtain patent to lode claims generally applicable to placers.
§ 700. Description of placer claims upon surveyed lands.
§ 701. Proof of the five hundred dollar expenditure.
§ 702. Proof of mineral character of the land.
§ 703. Proof that no known lodes exist within limits of placer claim.
§ 704. Lodes within placers—How applied for.
§ 705. Application for placers in Alaska.

**§ 699. Proceedings to obtain patent to lode claims generally applicable to placers.**—The proceedings to obtain title to that class of mineral lands falling within the designation of placers—that is, forms of deposit not in place, as defined in a previous chapter [16]—are similar to proceedings prescribed for obtaining patents for vein or lode claims.[17]

[15] Jawbone Lode, etc., 34 L. D. 72.

[16] *Ante,* §§ 419–428.

[17] Rev. Stats., § 2329; 16 Stat. 217; Comp. Stats. 1901, p. 1432; 5 Fed. Stats. Ann. 42; Gen. Min. Reg., par. 58, Appendix; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 227, 24 Sup. Ct. Rep. 632, 48 L. ed. 944. For additional requirements affecting the patenting of placer claims in Alaska, see § 705, *post.*

In the language of the departmental regulations,—

> The proceedings for obtaining patents for veins, or lodes, having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter and make such slight modifications in the notice or otherwise as may be necessary, in view of the different nature of the two classes of claims, placer claims being fixed, however, at two dollars and fifty cents per acre or fractional part of an acre.[18]

There are a few matters, however, to which attention should be invited, taking the patent proceedings as heretofore outlined in cases of lode claims as a basis, and supplementing or modifying them in the particulars hereinafter suggested.

**§ 700. Description of placer claims upon surveyed lands.**—We have heretofore observed that where placer claims are upon surveyed lands and conform to legal subdivisions, no survey or plat is required.[19]

It will be noted that the smallest legal subdivision of the government surveys recognized by the department is a tract of ten acres.[20] Where the location or aggregation of contiguous locations forms a compact body susceptible of description by fractions of a quarter section or by lots, where the area of such lots has been accurately determined, it will be sufficient to so describe the claim in the patent application and in all proceedings before the land department. Such lots, however, are not susceptible of legal subdivision, and if less than the entire lot is located and applied for, a survey must be had.[21]

[18] Id., par. 59, Appendix.
[19] *Ante*, § 672.
[20] Gen. Min. Reg., pars. 22, 28, Appendix.
[21] *Ante*, § 448, p. 790.

Frequently, by segregation of mineral surveys, irregularly shaped fragments result. These are designated by the surveyor-general by a lot number, and may be dealt with as distinct entities, and may be located and applied for without survey, simply designating the lot number within the given section.

The land department at one time held that noncontiguous tracts of placer ground intersected by prior patents could not be embraced in a patent application under a description covering the entire area and reserving therefrom that covered by the prior patents, and that such noncontiguous tracts were units, to be separately dealt with.[22]

We have heretofore noted, however, that this ruling no longer obtains, but that one may apply for and the government may grant to the placer claimant the particular subdivision or area lawfully covered by his location, less what may have theretofore been conveyed to others.[23]

**§ 701. Proof of the five hundred dollar expenditure.** In cases where the claim conforms to the legal subdivisions of the public surveys, as the surveyor-general has no office to perform,[24] it is necessary for the applicant to furnish proofs, consisting of his own affidavit corroborated by the affidavits of two disinterested witnesses, showing clearly the character, extent and value of the improvements upon the premises.[25] Such proofs should be specific, and establish all the facts which are required to be shown by the deputy mineral surveyor, and certified to by the surveyor-general, where pro-

22 Grassy Gulch Placer, 30 L. D. 191.

23 *Ante*, § 448b.

24 *Ante*, § 672.

25 Gen. Min. Reg., pars. 24, 25, 60, Appendix; In re Palmer, 38 L. D. 294.

ceedings for patent are based upon mineral survey, as pointed out in previous sections,[26] and should be furnished in duplicate.[26a]

They should describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the course and distance thereof to the nearest corner of the public surveys.[27]

There is this distinction between the five hundred dollar requirement for patent purposes and the one hundred dollar provision for annual labor: the former is a question between the government and the applicant, the latter solely between rival adverse mineral claimants. If the five hundred dollars has been expended by the applicant or his grantors, the land department will not concern itself with the question as to whether or not the annual labor has been regularly performed.[28]

Where a placer application also embraces an application for known lodes, an expenditure of five hundred dollars on the placer and a like expenditure on each known lode claim applied for must be shown.[29]

**§ 702. Proof of mineral character of the land.**— What we have heretofore said [30] with reference to proof of the mineral character of the land sought to be entered under the laws applicable to lode claims applies with equal force to placers; and where the tract is applied for by government subdivisions, the facts in this behalf required to be fully set forth in the descriptive

[26] *Ante*, § 673.

[26a] Circular of April 23, 1913.

[27] Gen. Min. Reg., par. 60, Appendix.

[28] In re Wolenberg, 29 L. D. 302, 488.

[29] Ute Placer and Oregon et al. Lode Claims, unpublished decision, Oct. 6, 1906, secretary of the interior.

[30] § 689.

report[31] of the surveyor, when the application is based upon a survey, should be fully presented in the form of the affidavit of the claimant, corroborated by disinterested and credible witnesses. Such proofs take the place and perform the functions of descriptive reports required of surveyors.

The statement as to the mineral character of the tract applied for must depend upon the nature of the deposit and the natural features of the ground. In the case of placer gold, the yield per pan or cubic yard should be given, also distance to bedrock and formation and extent of the deposit, and any other facts supporting the claim of valuable mineral character. The natural features of the claim, streams, if any, character of timber and other growth, and also a statement that title is not sought to control watercourses or to obtain valuable timber, but in good faith because of the mineral, should be incorporated in the formal application for patent.[32]

The practice is sanctioned by the department where applications are made to enter placer ground by legal subdivisions, permitting the applicant to apply to the surveyor-general for a descriptive report without survey. Such descriptive report, although not in terms provided for, would certainly rank as a deposition, and in doubtful cases would probably have controlling weight.

**§ 703. Proof that no known lodes exist within limits of placer claim.**—The land department requires, in all cases of applications for placer patents, that proof, consisting of the affidavits of two or more wit-

[31] *Ante*, § 672.

[32] Gen. Min. Reg., par. 60, Appendix.

nesses, should be filed showing that there are no known lodes, or veins, within the tract applied for.[33]

If the claim be all placer ground, that fact must be stated in the application and corroborated, or if it contains known lodes, a description of all known lodes with reference to the boundaries of the placer claim should be furnished.[34]

Considering that a placer patent is not of itself conclusive evidence of the fact that no known lode existed within the limits of the placer claim at the date of the application, and that the department now maintains the right to patent such a lode within the limits of a prior patented placer,[35] it would seem that the investigation as to "known lodes" in the proceedings to obtain placer patent is superfluous. It is not a fact necessarily to be determined in such proceeding. If such a lode existed, although not located at the time of the filing of the application for placer patent, it is reserved by operation of law, notwithstanding any adjudication made by the land department in the placer proceeding.

The regulation may be upheld, however, upon the theory that the land department has a right to be specifically informed of the precise nature of the deposit sought to be entered.

As to whether the owner of a located lode within the limits of a placer claim is compelled to adverse the placer application is a subject reserved for discussion when we deal with adverse claims in the succeeding chapter.[36] What constitutes a known lode, which as such is reserved out of a placer patent, will be consid-

33 Gen. Min. Reg., par. 26, Appendix.
34 Gen. Min. Reg., par. 60, Appendix.
35 *Ante*, § 413.
36 *Post*, § 720.

ered when we discuss the nature and effect of placer patents.[37]

It is sufficient to note that the land department requires proof that no known lodes exist within the limits of the placer claim. The regulation is not unreasonable, and must be followed. The course to be pursued where the proofs show the existence of a known lode is pointed out in the next section.

**§ 704. Lodes within placers—How applied for.**—If a lode is located within the limits of a placer prior to the filing of the placer application, and is held by persons other than the placer claimant, it may be applied for by the owners the same as if the placer claim did not exist. Where the existence of the lode was known at the time of the placer application, but was not located until after the placer patent was issued, the land department will, upon a satisfactory showing as to the prior known existence of the lode and its subsequent location, permit the lode claimant to proceed to patent.[38] In such cases the lode claimant proceeds in the same manner as in other cases.

When an applicant for a placer patent is also in possession of a known vein or lode included therein, he must, if he desires to secure title thereto, state in his application that the placer claim includes such vein or lode.[39] The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be so stated in the application for patent. In all cases, whether the lode is claimed or excluded, it must

[37] *Post*, § 781.

[38] *Ante*, § 413.

[39] Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 228, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

be surveyed and marked upon the plat, the field-notes and plat giving the area of the lode claim or claims and the area of the placer separately.[40]

Where such lode exists, an application for placer patent which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant has no right to the possession of the vein or lode claim.[41]

A patent application for a known lode within the limits of a pending placer application cannot proceed beyond the point of filing. It must then await the determination of the department as to the known existence of the lode prior to the filing of the application for placer patent.[42]

A placer applicant will not be allowed to amend his application for patent, so as to embrace therein veins or lodes discovered by others after the location of the placer claim, but prior to the application therefor and not included in the placer application as originally submitted.[43]

As heretofore noted,[44] where a placer application also embraces an application for known lodes, an expenditure of five hundred dollars on the placer and a like sum on each claimed lode must be shown.

**§ 705. Application for placers in Alaska.**—Where the location is made by power of attorney, a certified copy showing the recordation thereof must be filed or made a part of the abstract of title. The application

40 Gen. Min. Reg., pars. 26, 60, Appendix.

41 Rev. Stats., § 2333; *ante*, § 413; Gen. Min. Reg., par. 60, Appendix; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 228, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

42 Jawbone Lode and Damon Placer, 34 L. D. 72.

43 Aurora Lode v. Bulger Hill and Nugget Gulch Placer, 23 L. D. 95.

44 § 701.

must be accompanied by a sworn statement setting forth the names of all placer claims, dates and names of locators, which were located under powers of attorney during the calendar year in which the claim applied for was located. There must also be a sworn statement as to each locator who had an interest in the location showing all placer locations made by him during the calendar month in which the claim applied for was located. No application will be considered which involves a location made after August 1, 1912, when the area is in excess of forty acres. The foregoing requirements have arisen by reason of the passage of the act of August 1, 1912, and affect placer mining claims thereafter located in Alaska.[44a]

## Article III. Millsites.

§ 708. Manner of acquiring patents to millsites.

**§ 708. Manner of acquiring patents to millsites.**— Millsites may be patented subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes.[45] We have heretofore noted that the mining laws provide for the appropriation of two classes of millsites:—

(1) Such as are used and occupied by the proprietor of a vein or lode for mining or milling purposes;

(2) Such as have thereon quartz-mills or reduction works, the ownership of which is disconnected with the ownership of a lode or vein.[46]

[44a] 37 Stats. at Large, 242, and Circular of Instructions, October 29, 1912, in 41 L. D. 347–350.

[45] Rev. Stats., § 2337; 17 Stat. 96; Comp. Stats. 1901, p. 1436; 5 Fed. Stats. Ann. 52.

[46] *Ante*, § 520.

In cases of the first class, the claimant desiring to obtain a patent for his millsite must embody in his application for an order of survey a description of the site claimed and a certified copy of the location notice under which he asserts his claim.

The deputy surveyor surveys the millsite, giving it the same number as the claim, but designating it by a different letter. For example: The survey of the claim is designated as "Sur. No. 37-A," and the millsite as "Sur. No. 37-B," or whatever may be its appropriate number. In the published and posted notices of the application for patent, the millsite must be as carefully described as the lode claim,[47] and the course and distance from a corner of the millsite to a corner of the lode claim must invariably be given, and a copy of the plat and notice of application for patent must be posted on the millsite.[48]

Where an application for a group of millsite locations is justified,[49] posting of the notice of application for patent on one of the locations within the group is sufficient.[50] The application for patent should also clearly point out the necessity for including more than one millsite location.[51]

A claimant owning an unpatented millsite actually used for mining or milling purposes in connection with a patented lode may apply for a patent for the millsite separately, in which case he is required to proceed pre-

47 Reed v. Bowron, 32 L. D. 383.

48 Gen. Min. Reg., par. 63, Appendix; Peacock Millsite, 27 L. D. 373; *ante*, § 677.

49 *Ante*, § 520.

50 Phoenix Gold Min. Co., 40 L. D. 313. This overrules the *dictum* in the case of Hardcash et al. Millsites, 34 L. D. 325, where it was intimated that there should be a posting on each separate location in the group.

51 Alaska Copper Co., 32 L. D. 128; Helena etc. Co. v. Dailey, 36 L. D. 144, 149.

cisely the same as in cases of applications for mining claims.[52] The same method must be pursued when a patent is sought for a millsite claimed independent of any lode ownership.[53]

Proof of the nonmineral character of the land sought to be entered as a millsite must in all cases be furnished. This proof consists of the sworn statement of two or more persons capable, from acquaintance with the land, of testifying understandingly.[54]

The character of the land embraced within a claimed millsite is just as much the subject of contest as the character of land in other classes of mineral or agricultural entries, and hearings are ordered and the controversy heard and determined in the same manner as other cases where the character of the land is in issue.[55]

The known character of the land at the date of the millsite application and not at the date of the millsite location is the true test.[56] Comment has been made heretofore [57] on the varying opinion of the department as to the correct interpretation to be given the language of the statute that a millsite must be "noncontiguous" to the lode.

It is not necessary to show any particular amount of expenditures upon a millsite as a prerequisite to a patent. If claimed in connection with a lode, it will be sufficient to show that it is used for mining or milling purposes,[58] but it must be so used and occupied at the time of the application.[59]

52 Eclipse Millsite, 22 L. D. 496.
53 Gen. Min. Reg., par. 64, Appendix.
54 Id., and par. 61; *ante*, § 521.
55 In re Becker, 5 Copp's L. O. 51.
56 Reed v. Bowron, 32 L. D. 383.
57 *Ante*, § 522.
58 Alta Millsite, 8 L. D. 195.
59 Hard Cash et al. Millsites, 34 L. D. 325; Alaska Copper Co., 32 L. D. 128.

Where the right to patent is asserted under the second clause of section twenty-three hundred and thirty-seven of the Revised Statutes, the right to make the entry depends upon the existence thereon of a quartz-mill or reduction works.[60]

We have fully discussed in previous sections the nature of the use required to perfect a valid appropriation of a millsite. The rules there enunciated will not be repeated.[61]

[60] In re Lennig, 5 L. D. 190; Cyprus Millsite, 6 L. D. 706; Two Sisters Lode and Millsite, 7 L. D. 557; Le Neve Millsite, 9 L. D. 460; Hecla Cons. M. Co., 12 L. D. 75.

In the "Mineral Law Digest" of Messrs. Clark, Heltman and Consaul (p. 359, par. 55) are noted some unpublished decisions which require the applicant to furnish the surveyor-general's certificate showing that five hundred dollars has been expended on the millsite. It would be difficult to conceive of a quartz-mill or reduction works which would not exceed in value the sum named, but we are not aware of any law which authorizes the department to place millsites on the footing with mining claims, with reference to the value of the expenditures.

[61] *Ante*, §§ 523, 524.

# CHAPTER IV.

## THE ADVERSE CLAIM.

ARTICLE I. INTRODUCTORY.
II. WHAT IS AND WHAT IS NOT THE SUBJECT OF AN ADVERSE CLAIM.
III. HOW, WHEN, AND WHERE ADVERSE CLAIM MUST BE ASSERTED.

## ARTICLE I. INTRODUCTORY.

§ 712. Distinction between adverse claim and protest.
§ 713. Patent proceedings are essentially *in rem*.

**§ 712. Distinction between adverse claim and protest.**—The patent proceeding in the land office may be interrupted and its consummation delayed by the filing of an adverse claim or by the presentation of a protest. There is a marked difference between the two.[1] An adverse claim is based upon the assertion of an adverse right to the tract applied for, or some part of it. A protest is not necessarily based upon any asserted right. As a general rule, a protest will not lie where the defect is properly the subject of an adverse claim.[2]

This rule is not of universal application, however, for an adverse claimant may be defeated in the courts on some ground which does not involve an inquiry into the validity of the applicant's location, and where it is subsequently alleged by way of protest that there is a vital defect in the applicant's title,—e. g., a total lack of discovery. Under such circumstances the land department will entertain a protest, although filed by a

1 Rev. Stats., § 2326; 17 Stat. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35; and Gen. Min. Reg., pars. 78–88, Appendix.

2 Mutual M. & M. Co. v. Currency Co., 27 L. D. 191.

defeated adverse claimant.[3] Often a protestant is a mere volunteer, an *amicus curiae,* who calls the attention of the department to an alleged noncompliance with the law on the part of the applicant,[4] which otherwise might be overlooked, or raises the issue as to the character of the land, in the ultimate determination of which issue the protestant may or may not have an interest proximate or remote.[5]

As explained in succeeding sections, where an adverse claim is filed, its determination upon the merits is relegated to the courts, and the functions of the land department are, for the time being, suspended. In cases of protest, the department retains jurisdiction, and investigates and determines the issues raised without resort to the courts.[6]

An "adverse claim," so called, but which as a matter of fact cannot be recognized as such, may be treated as a protest.[7]

**§ 713. Patent proceedings are essentially in rem—Adverse claims must be presented.**—The proceedings by which the patent for a mining claim is obtained are essentially *in rem,* and are binding upon all the world so far as any unpresented adverse claim is concerned.[8]

[3] Rupp v. Heirs of Healey, 38 L. D. 387.

[4] Gowdy v. Kismet M. Co., 25 L. D. 216; Cain v. Addenda M. Co., 24 L. D. 18; S. C., on review, 29 L. D. 62; Beals v. Cone, 188 U. S. 184, 187, 23 Sup. Ct. Rep. 275, 47 L. ed. 435. As to the precise nature and function of a protest, see Wight v. Dubois, 21 Fed. 693; Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 787.

[5] Hughes v. Ochsner, 27 L. D. 396; Gillis v. Downey, 29 L. D. 83.

[6] As to what may be considered grounds of protest after period of publication and failure to adverse, see Hughes v. Ochsner, 27 L. D. 396; Gross v. Hughes, 29 L. D. 467; Bunker Hill etc. Co. v. Shoshone M. Co., 33 L. D. 142, and Rupp v. Heirs of Healey, 38 L. D. 387.

[7] Low v. Katalla Co., 40 L. D. 534.

[8] Hamilton v. Southern Nev. G. & S. M. Co., 13 Saw. 113, 33 Fed.

They are judicial. The publication and posting of notice of the application for patent is a *process* which brings all adverse claimants into court—a summons to all persons whose interests may be affected by the issuance of a patent to the tract applied for, to appear and file their adverse claims.[9]

> True, no adverse claimant or supposed claimant may be named in the notice; no process may be served personally upon him, but that does not avoid the notice or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated. Unknown heirs are often thus brought in by a published notice. Tax proceedings, condemnation of rights of way, admiralty cases, and many others, present similar illustrations.[10]

If parties holding such claims, in hostility to the applicant, as are the proper subject of adverse proceedings stand by and allow the statutory time for filing their adverse claims to elapse, their rights, so far as the same might have been determined in such proceed-

562, 565, 15 Morr. Min. Rep. 314; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278.

[9] Wight v. Dubois, 21 Fed. 693, 695; Wolfley v. Lebanon M. Co., 4 Colo. 112, 117, 13 Morr. Min. Rep. 282; Hunt v. Eureka Gulch M. Co., 14 Colo. 451, 455, 24 Pac. 550; People ex rel. Darby v. District Court, 19 Colo. 343, 347, 35 Pac. 731; Commrs. Letter, Copp's Min. Dec. 75; Kannaugh v. Quartette M. Co., 16 Colo. 341, 27 Pac. 245, 247; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho M. & D. Co., 109 Fed. 538, 545, 48 C. C. A. 665; Golden Reward M. Co. v. Buxton M. Co., 79 Fed. 868, 873; Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 857, 52 Pac. 178, 53 Pac. 178, 179, 19 Morr. Min. Rep. 286; Mutual M. & M. Co. v. Currency Co., 27 L. D. 101; Shields v. Simington, 27 L. D. 369, 371; Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015; Stock Oil Co., 40 L. D. 198.

[10] Wight v. Dubois, 21 Fed. 693, 695.

ings, in the absence of fraud or mistake, are forever lost.[11]

The law provides that if no adverse claim is filed within the time specified, it shall be assumed that the applicant is entitled to a patent, and thereafter no objection from third parties to the issuance of the patent shall be heard, except it be shown that the applicant has failed to comply with the law,[12] which failure may be brought to the attention of the department by protest only, as indicated in the preceding section.

It is therefore necessary for us to determine,—

(1) What is and what is not the proper subject of an adverse claim;

(2) How, when, and where must it be asserted; and

(3) The effect of failure to assert it.

## Article II. What is and What is not the Subject of an Adverse Claim.

§ 717. Character of land—Agricultural claimants.
§ 718. Prior patentees and prior patent applicants.
§ 719. Mortgagees — Lienholders —Owners of equitable interests.
§ 720. Lode claimant *versus* placer applicant.
§ 721. Placer claimant *versus* lode applicant.
§ 722. Mineral claimant *versus* townsite applicant.
§ 723. Townsite claimant *versus* mineral applicant.
§ 724. Millsite claimant *versus* mineral applicant.
§ 725. Tunnel proprietor *versus* lode applicant.
§ 726. Owners of lodes located prior to May 10, 1872.
§ 727. Cross-lodes.
§ 728. Co-owners.
§ 729. Easements.
§ 730. Underground conflicts.
§ 731. Parties relocating after period of publication.

[11] Kannaugh v. Quartette M. Co., 16 Colo. 341, 27 Pac. 245.

[12] Rev. Stats., § 2325; 17 Stat. 92; Comp. Stats. 1901, p. 1429; 5 Fed. Stats. Ann. 31.

**§ 717. Character of land—Agricultural claimants.** Section twenty-three hundred and twenty-five of the Revised Statutes only contemplates adverse proceedings as between rival mineral claimants to the land, and does not have in view a settlement of the character of the land as between mineral and agricultural claimants.[13]

> Adverse proceedings are called for only where one mineral claimant contests the right of another mineral claimant.[14]

As was said by the supreme court of the United States in another case:—

> The purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired title from the government, they shall bring their respective claims to the same property, in the manner prescribed by the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the land department in determining which of these *claimants* shall have the patent—the final evidence of title from the government.[15]

The department, having jurisdiction over all public land until patent issues,[16] may at any time, either on its own motion or on an application made by others, order a hearing for the purpose of determining its charac-

[13] Ryan v. Granite Hill M. & D. Co., 29 L. D. 22; Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495; Helena & Livingston S. & R. Co. v. Dailey, 36 L. D. 144; Le Fevre v. Amonson, 11 Idaho, 45, 81 Pac. 71, 72; Stevens v. Grand Central M. Co., 133 Fed. 28, 31, 67 C. C. A. 284.

[14] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 360, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[15] Iron S. M. Co. v. Campbell, 135 U. S. 286, 299, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

[16] Olive L. & D. Co. v. Olmstead, 103 Fed. 568, 577, 20 Morr. Min. Rep. 700.

ter.[17] There is no other tribunal provided by law for that purpose whose judgment would necessarily be binding upon the department.[18]

The courts are not called upon to determine this question, except in certain classes of possessory actions disconnected with land office proceedings. Where the land department once enters upon the investigation of the character of the land, the courts are without jurisdiction until the question has finally been determined by the department.[19] Adverse suits arising out of patent proceedings do not involve the character of the land, for the court takes for granted the mineral character of the land.[20]

An agricultural claimant can only raise the issue by way of protest, demanding a hearing for the purpose of establishing the nonmineral character of the tract, and this he may do at any time prior to patent. The distinction between the adverse claim and protest has been outlined in a previous section.[21]

Where one has made a valid location on public land, mere trespassers making no claim to the ground under any of the public land laws cannot oust the mineral locator from possession by showing that the land is more valuable for some purpose other than mining.[22]

17 This rule has been applied to the administration of the forest reservations. The department claims the right to investigate on its own initiative the status of mining locations within national forests, and if found invalid, to declare them void, although no patent has been applied for. In re Yard, 38 L. D. 59. See discussion of this question, *ante*, § 664, and particularly note 61a.

18 Powell v. Ferguson, 23 L. D. 173; Snyder v. Waller, 25 L. D. 7; Alice Placer, 4 L. D. 314; Helena etc. Co. v. Dailey, 36 L. D. 144; Low v. Katalla Co., 40 L. D. 534, 540.

19 *Ante*, § 108.

20 Clipper M. Co. v. Eli M. Co., 34 L. D. 401.

21 *Ante*, § 712.

22 Veronda v. Dowdy, 13 Ariz. 265, 108 Pac. 482.

While controversies over the character of the land are not subjects of adverse claims under the sections of the Revised Statutes under consideration,[23] they are, however, the subject of protest in any proceeding where title to public land is sought to be acquired, and where such issue is raised, it is the duty of the department to see that the lands are disposed of according to the law governing the quality of the lands under consideration. Lands cannot be located under the mining laws for purposes or uses foreign to mining, and this inquiry may involve the good faith of the applicant.[24]

While in adverse suits which are litigated in the courts questions of the character of the land may to some extent become involved, their decisions are not necessarily binding on the department on this subject. They may, however, be accepted as advisory.[25]

The department is a tribunal specially charged under the law with the determination of this fact, and in this determination the courts perform no auxiliary function,[26] for the question is one exclusively within the jurisdiction of the land department.[27]

**§ 718. Prior patentees and prior patent applicants.** The term "adverse claim," as used in section twenty-three hundred and twenty-six of the Revised Statutes, implies a right asserted in hostility to the patent applicant. The proceeding based upon the adverse claim is

23 Le Fevre v. Amonson, 11 Idaho, 45, 81 Pac. 71, 72; Wright v. Town of Hartville, 13 Wyo. 497, 81 Pac. 649, 650; Nevada Exploration Co. v. Spriggs (Utah), 124 Pac. 770, 771.

24 Grand Canyon Ry. Co. v. Cameron, 36 L. D. 66; Helena etc. Co. v. Dailey, 36 L. D. 144.

25 Mauser Lode Claim, 27 L. D. 326; Reins v. Raunheim, 28 L. D. 526; Meaderville M. & M. Co. v. Raunheim, 29 L. D. 465.

26 Ryan v. Granite Hill M. & D. Co., 29 L. D. 522.

27 Clipper M. Co. v. Eli M. Co., 34 L. D. 401; see, also, Southern Development Co. v. Enderson, 200 Fed. 272, 283.

essentially one to determine the right of possession to the whole or a part of the surface area described in the published and posted notice of application for patent. It is necessarily based upon the assumption that the paramount title to the tract applied for resides in the general government, whose patent when regularly issued would operate as a judgment conclusive upon those who failed to assert their adverse rights. Where a patent has once been issued, purporting to convey a given tract in its entirety, the functions of the land department, except possibly in the case of known lodes within placers and known mines within townsites,[28] are exhausted, and the patentee need no longer concern himself with any subsequent application embracing any portion of the same area.[29]

There is nothing to be gained by any judicial proceeding.[30] The statutory provisions relative to adverse claims apply only to cases where there are adverse claims to the same unpatented ground; hence a suit instituted by a prior patentee against a subsequent applicant is not an adverse proceeding.[31] The holder of a certificate of purchase or one who has entered and paid for the land need not adverse.[32]

We have heretofore noted that where an application for patent is once made, if prosecuted with reasonable diligence, no second application seeking a patent for

[28] *Post*, §§ 721, 722.

[29] Iron S. M. Co. v. Campbell, 135 U. S. 286, 299, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218; Bennett v. Harkrader, 158 U. S. 441, 447, 15 Sup. Ct. Rep. 863, 39 L. ed. 1046; Equator M. & S. Co., 2 Copp's L. O. 114; In re Ramage, Id. 115; Sinnott v. Jewett, 33 L. D. 91; Low v. Katalla Co., 40 L. D. 534, 538.

[30] Discovery Placer v. Murray, 25 L. D. 460.

[31] North Star Lode, 28 L. D. 41.

[32] Murray v. Montana Lumber Mfg. Co., 25 Mont. 14, 63 Pac. 719, 721; Owers v. Killeran, 29 L. D. 160.

the same tract or a part of it will be received by the land officers, so long as the first application remains pending.[33]

It logically follows that a prior applicant for patent whose application is pending and undetermined is not called upon to adverse any subsequent conflicting application.[34]

**§ 719. Mortgagees—Lienholders—Owners of equitable interests.**—One holding a mortgage executed by the applicant upon the tract applied for does not antagonize such applicant's title. The mortgagor of a mining claim would not be permitted to abandon a claim and secure a title adverse to the mortgagee by a relocation;[35] nor will the law permit him to do any act which would impair the mortgage security. The equities of the mortgagee rest upon the applicant's title, and the patent when issued would inure to the benefit of the mortgage. The same may be said of all classes of encumbrances and liens voluntarily imposed by the applicant. This seems to be fully provided for by the last clause of section twenty-three hundred and thirty-two of the Revised Statutes, which provides that,—

> Nothing in this chapter shall be deemed to impair any lien which may have attached in any way what-

[33] *Ante*, § 679.

[34] Steel v. Gold Lead G. & S. M. Co., 18 Nev. 80, 87, 1 Pac. 448, 15 Morr. Min. Rep. 293; In re McConaghy, 29 L. D. 226; Morgan v. Antler's Park Regent Cons. M. Co., 29 L. D. 114.

The land department has held that under certain circumstances the second application may be treated as an adverse claim (Hall v. Street, 3 L. D. 40); but the case wherein the rule is announced is of doubtful value as a precedent.

[35] Alexander v. Sherman, 2 Ariz. 326, 16 Pac. 45, 15 Morr. Min. Rep. 638. See *ante*, § 407.

ever to any mining claim or property thereto attached prior to the issuance of the patent.[36]

So with a contract of purchase, a lease, or any other instrument which by act of the parties creates an equitable right based upon the applicant's title. The statute has reference to an adverse claim arising from independent and conflicting locations of the same ground and not to a controversy between parties claiming rights predicated upon or flowing from the same location,[37] and the failure to adverse does not estop a party from maintaining a suit for specific performance of a contract previously made, such a claim not being adverse to the patent, but under it to enforce a trust.[38]

Holders of this class of interests are not called upon to adverse the patent application.[39]

The same rule should apply to cases of trusts,—express or resulting.[40]

This doctrine, however, will not apply to rights asserted arising out of judicial proceedings which are in their nature *in invitum,* such as tax and execution sales, which operate only upon the title as it stands at the time the sale takes place. A tax or sheriff's deed can, at best, only have the operation of a quitclaim deed in its strictest sense. This class of deeds cannot pass an interest which the owner did not have before the sale, but which he subsequently acquires.[41]

[36] Copp's Min. Dec. 45.

[37] Stevens v. Grand Central M. Co., 133 Fed. 28, 31, 67 C. C. A. 284.

[38] Nowell v. McBride, 162 Fed. 432, 441, 89 C. C. A. 318.

[39] Shoo Fly and Magnolia Lode v. Gisborn, 1 Copp's L. O. 135, 138; Harriet M. Co. v. Phoenix M. Co., 9 Copp's L. O. 165.

[40] Murray v. Montana L. & M. Co., 25 Mont. 14, 63 Pac. 719, 720.

[41] Hamilton v. Southern Nev. G. & S. M. Co., 13 Saw. 113, 117, 33 Fed. 562, 565, 15 Morr. Min. Rep. 314.

We think there can be no doubt that a patent or certificate of purchase issued as the result of the patent proceeding is a subsequently acquired title. Whenever such title will, when acquired, inure to the benefit of an encumbrancer, lienholder, or other person claiming an equitable interest under the applicant, no adverse claim need be filed. Equity will control the patent title in favor of the party holding the equitable title.[41a] When, however, such subsequently acquired title will not inure to the benefit of a party asserting an interest, he must protect his rights by filing an adverse claim.

In the opinion of the supreme court of Montana a judgment creditor having a judgment lien is not required to adverse.[42]

In the state of Washington it has been held that unpatented mining claims are not subject to judgment liens.[43]

**§ 720. Lode claimant versus placer applicant.**— Where the existence of a lode within the limits of a placer is known prior to the application for placer patent, and such lode is included and applied for in the placer application, all others claiming an interest in the lode in hostility to the applicant must necessarily adverse the applicant, as the patent when issued would embrace the lode. Where the existence of the lode is known, and the placer applicant fails to assert his right to it by including it within his application, such failure

41a Text cited with approval in Las Vegas & T. R. Co. v. Summerfield (Nev.), 129 Pac. 303, 305.

42 Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 13.

43 Phoenix M. & M. Co. v. Scott, 20 Wash. 48, 54 Pac. 777.

is a conclusive declaration that he has no right to the possession of the vein or lode.[44]

We think it well settled that such lode claimant need not, under such circumstances, institute adverse proceedings against the placer application,[45] unless he claims more than twenty-five feet on each side of his lode, in which event the land department holds that he must either adverse or he will be relegated to only his lode and twenty-five feet of territory on each side of its center.[46]

In the case of Dahl v. Raunheim,[47] an action between a placer and lode claimant, the supreme court of the United States comments upon the failure of a lode claimant to adverse a placer application, and announces the rule that, having so failed, the lode claimant is precluded from calling in question the location of the claim "*or its character as placer* ground." From the facts recited in this opinion it appeared that the lode location was initiated *subsequent* to the filing of the placer application.[48]

[44] Rev. Stats., § 2333; 17 Stat. 94; Comp. Stats. 1901, p. 1433; Fed. Stats. Ann. 45; Reynolds v. Iron S. M. Co., 116 U. S. 687, 698, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591; Iron S. M. Co. v. Reynolds, 124 U. S. 374, 382, 8 Sup. Ct. Rep. 598, 31 L. ed. 466; Noyes v. Mantle, 127 U. S. 348, 352, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168, 15 Morr. Min. Rep. 611.

[45] Mantle v. Noyes, 5 Mont. 274, 5 Pac. 856, 861; Noyes v. Mantle, 127 U. S. 348, 353, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168, 15 Morr. Min. Rep. 611.

[46] Jawbone Lode v. Damon Placer, 34 L. D. 72, 77; Daphne Lode, 32 L. D. 513, 519.

[47] 132 U. S. 260, 261, 10 Sup. Ct. Rep. 74, 33 L. ed. 324, 16 Morr. Min. Rep. 214.

[48] The facts recited in the opinion of the supreme court of Montana show that the lode location was junior in point of time to the placer, but that it was made prior to the filing of the placer application for patent. Raunheim v. Dahl, 6 Mont. 167, 9 Pac. 892. We are advised that the record in the case sustains the recitals found in the opinion

That the court did not intend to decide that a lode claimant must adverse a placer application or be precluded from showing subsequently that the lode was known to exist at the time the placer application was filed, is manifest from its language in another portion of the opinion. "The only position upon which the defendant (the lode claimant) can resist the pretensions of the plaintiff is, that the placer ground, for a patent of which he applied, does not embrace the lode claim." That is, that the lode was known to exist within the limits of the placer ground prior to the filing of the placer application, and therefore did not pass by the placer patent. This view harmonizes with the later decisions of the same court.

Where a lode is known to exist at the time of the placer application, which is not claimed by either the placer applicant or anyone else, it will nevertheless be excepted out of the placer patent, and may be located and acquired even after the issuance of the placer patent.[49]

A claimant to a known lode within a placer may, as a matter of expediency, adverse the application for the placer patent, and secure a segregation of his lode claim; but a failure to do so will not prevent him from showing at any time that the lode was known to exist at the time the placer application was filed, and that under the law such lode never passed by the placer patent.

While the exception of a known vein or lode not applied for by the placer claimant does not depend upon the filing of an adverse claim, the fact remains

of the supreme court of Montana. See Discovery Placer v. Murray, 25 L. D. 460.

[49] Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 407, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

that this course presents the most effectual means of obtaining a final and satisfactory determination of the rights of conflicting claimants.[50]

We have heretofore discussed the location and patenting of lodes within placers, and noted the attitude of the land department upon this subject.[51]

As the law does not require the lode claimant to adverse where the lode is not included in the placer application, he loses no rights by failing to do so,[52] except that as far as surface ground is concerned the land department will, when the lode claimant subsequently applies for patent, confine him to his lode and twenty-five feet in width on each side thereof.[53]

There is another plausible exception to the foregoing rule: Where a lode is wholly without the placer, but the side-lines of the lode claim extend into the placer, creating a surface conflict, the lode claimant must adverse, or he waives his right to the area in conflict.[54]

Controversies between these two classes of claimants involve the character of the land, and the department retains jurisdiction to investigate this question, even after the placer patent has been issued.[55]

Where there is a controversy between a lode claimant and a placer claimant, which involves the character of the *deposit*, that is, whether it is a lode or a placer,

[50] Cripple Creek G. & S. M. Co. v. Mt. Rosa M. & M. Co., 26 L. D. 622.

[51] *Ante*, §§ 413, 703, 704.

[52] Elda M. & M. Co. v. Mayflower G. M. Co., 26 L. D. 573; Cape May M. & L. Co. v. Wallace, 27 L. D. 676; North Star Lode, 28 L. D. 41.

[53] Jawbone Lode v. Damon Placer, 34 L. D. 72, 77; Daphne Lode, 32 L. D. 513, 519.

[54] Wilson Creek Cons. M. Co. v. Independence T. & M. Co., 1 Colo. Dec. Sup. 1; Legal Adviser No. 13, p. 1.

[55] *Ante*, § 413; South Star Lode (on review), 20 L. D. 204; Butte & Boston M. Co., 21 L. D. 125.

it was held by Judge Van Fleet, sitting as United States district judge in Idaho, that the question as to the nature of the deposit was one which must be determined by the land department, and that the court trying the adverse suit would limit its inquiry to the right of possession and would not pass upon the question whether the deposit was a lode or was placer ground.[55a] In this case rival placer and lode locators claimed the same deposit of rock phosphate.[56] The placer location was prior and on making application for patent the lode claimants filed an adverse and commenced suit.

In a later case, however, between the same parties involving precisely the same question, arising in the state of Wyoming, the circuit court of appeals for the eighth circuit held that the determination of the question whether the ground was subject to location as placer or lode was not within the exclusive jurisdiction of the land department, but was determinable by the court in the adverse suits.[57] The court, however, did not undertake to determine the force and effect of its judgment on the land department with reference to this issue.

Where the controversy is limited to the existence of a "known lode" within a placer, and a lode claimant adopts the suggestion of the land department above quoted, adverses the placer patent application, and in the litigation it is found by the court that no lode was known to exist, the land department treats this as a final adjudication of the question as to the existence of a "known lode," and after the issuance of the placer

[55a] Duffield v. San Francisco Chemical Co., 198 Fed. 942.

[56] See *ante*, § 425, as to nature of these deposits.

[57] San Francisco Chemical Co. v. Duffield, 201 Fed. 830, 834.

patent will decline to take jurisdiction of a subsequent patent application by the lode claimant.[58]

The force and effect of a placer patent will be further considered when dealing generally with the subject of patents.[59]

**§ 721. Placer claimant versus lode applicant.**— Where an application for a patent to a lode within the limits of a placer is made by a lode claimant, if the placer claimant asserts any right to the lode, he is necessarily called upon to adverse. Where his claim, however, is placer, pure and simple, ordinarily he has nothing upon which to base an adverse claim, unless the lode is entirely without the placer, and the controversy is confined to a conflicting surface, or the lode claimant seeks to acquire more surface than the law permits, or where the lode claimant has forcibly entered the placer and initiated a lode claim within its boundaries, if the application for a patent of the lode claim is not adversed, it may well be doubted whether the placer claimant could, after the issue of a patent under such circumstances, maintain an equitable suit to have the patentee declared the holder of the legal title to the ground for his benefit.[60] This latter exception to the rule is based on the fact that a lode claimant, who has initiated a lode location by forcible entry on an existing placer and against the consent, either express or implied, of the placer owner, and where the lode was previously undiscovered, has no valid claim of right to such vein or lode.[61]

[58] Alice M. Co., 27 L. D. 661.

[59] *Post*, § 781.

[60] Clipper Min. Co. v. Eli Mining & Land Co., 194 U. S. 220, 232, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[61] Id. See, also, San Francisco Chemical Co. v. Duffield, 201 Fed. 830.

If the controversy is between two rival locators, one claiming that the deposit is placer in character and the other that it is a lode, presenting a case which is not strictly that of a lode *within* a placer, we have a situation presented analogous to that discussed in the preceding section where the placer claimant applied for a patent and the lode claimant adversed. As there noted the question of the character of the deposit would be considered and determined by the court, leaving it for the land department to decide to what extent the judgment of the court would be binding on the department. At least this is the rule followed by the circuit court of appeals, eighth circuit,[62] which is not in harmony with the *nisi prius* decision in the ninth circuit noted in the preceding section.

There are several cases noted in the books where adverse proceedings have been instituted by the lode or placer claimant, and have been carried to judgment, where it seems to have been assumed that this procedure was proper. Among them we note the case of Bennett v. Harkrader.[63] We do not understand that there is anything in the opinion of the court militating against the views hereinbefore expressed. The effect of the judgment was not under consideration, and the land department treated it as not being conclusive against the right of the lode applicant to his lode, with some part of the surface.[64]

62 San Francisco Chemical Co. v. Duffield, 201 Fed. 830. In Webb v. American Asphaltum Co., 157 Fed. 203, 204, 84 C. C. A. 651, the same court determined the question of the character of the deposit in an adverse suit, though the question of jurisdiction had not been raised.

63 158 U. S. 441, 15 Sup. Ct. Rep. 863, 39 L. ed. 1046. See, also, Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 22 Morr. Min. Rep. 276.

64 Aurora Lode v. Bulger Hill and Nugget Placer, 23 L. D. 95, 348.

In a later case, however, it accepted such a judgment as final, and declined to take jurisdiction at the instigation of the lode claimant.[65]

In the case of Clipper Min. Co. v. Eli Min. & Land Co.[66] the supreme court of the United States said that a judgment in an adverse suit in favor of the placer claimants bringing the action was not to be regarded as conclusive, or that the judgment necessarily gave them the lodes in controversy, for the land department still had the power to decide against the validity of either placer or lode locations. The court intimated that a lode claimant who had peaceably discovered a lode within the limits of an existing placer location might be secured by a court of equity in the temporary possession of enough ground for successful working of the lode and at the same time protect the placer locator's rights, but that this equitable adjustment of coexisting rights could not be secured in a simple adverse action.

Where the placer claimant adverses the lode applicant and institutes a suit thereon, the department has ruled that it will not proceed with the patent application until the action is dismissed or determined.[67] This doctrine is undoubtedly based upon the theory that there may be matters involved in the suit other than the sole question as to the character of the land.

The courts and the land department have not at all times been harmonious in their views upon the necessity for a placer claimant to adverse the lode appli-

[65] Alice M. Co., 27 L. D. 661; Jawbone Lode v. Damon Placer, 34 L. D. 72.

[66] 194 U. S. 220, 232–235, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[67] In re Clipper M. Co., 22 L. D. 527; Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 6 L. D. 533; Thomas v. Elling (on review), 26 L. D. 220.

cant, or *vice versa;* but as the courts have no power to compel the department to proceed to patent, the ruling of the latter as to the suspension of jurisdiction in the case cited gives to such a proceeding the full force accorded to a proper adverse claim. In this aspect of the case the department seems to be in full control of the situation, and in view of the expression of opinion on this question contained in some of the authorities, it is certainly advisable for the placer claimant to adverse a lode application wherever the issuance of patent to the lode claim as applied for would interfere with any rights claimed by the placer owner. The courts must bide their time until the patent has been issued, when they alone have the power to determine its effect.

**§ 722. Mineral claimant versus townsite applicant.** With the exception of townsites applied for by incorporated cities or towns under the act of March 3, 1891,[68] mineral lands cannot be entered under the townsite laws. A townsite patent when issued would exclude from its operation all valid subsisting known mines and mining claims, such exclusion inuring to the benefit of those holding locations at the time of the townsite entry, and to their grantees.[69] Therefore, the owner of such mines or claims is not called upon to adverse the townsite application.[70] Even a protest would not be necessary or in fact available.[71]

[68] *Ante,* §§ 171, 174.

[69] *Ante,* § 177.

[70] Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 415, 5 Pac. 570, 577; Butte City Smokehouse Lode Cases, 6 Mont. 397, 404, 12 Pac. 858, 862.

[71] Lalande v. Townsite of Saltese, 32 L. D. 211. See, also, Nome & Sinook Co. v. Townsite of Nome (on review), 34 L. D. 276.

This class of cases bears some analogy to cases of claimants of known lodes within placers, discussed in another section.[72]

With reference to townsite applications by incorporated cities or towns under the act of March 3, 1891, for the reasons set forth in the next section, we think it the duty of a lode claimant to adverse the townsite application in order that the question of prior occupancy, if any, and its limits may be defined and determined, to the end that proper reservations may be inserted in the townsite patent.[73]

A townsite patent issued under the provisions of section sixteen of the act of March 3, 1891, will not disturb or impair rights under any valid mining claim or possession existing at the time of the townsite entry, or deprive the department of jurisdiction to subsequently issue a patent for any such mining claim or possession, on due showing of compliance with the mining law,[74] and after a hearing in the land office held after due notice has been given.[75]

**§ 723. Townsite claimant versus mineral applicant.** Following an opinion of the assistant attorney-general, the secretary of the interior held that persons in possession of the surface of a mining claim, occupying it for residence or business purposes, were adverse claimants within the meaning of the act of July 26, 1866;[76] and a like rule was at one time announced by the department in construing the provisions of the Revised Statutes.[77]

72 *Ante*, § 720.

73 See, also, *ante*, § 175.

74 Hulings v. Ward Townsite, 29 L. D. 21.

75 Mill Side Lode, 39 L. D. 356.

76 Becker v. Citizens of Central City, 2 Copp's L. O. 98.

77 Papina v. Alderson, 10 Copp's L. O. 52; Rico Townsite, 1 L. D.

Some of the courts have entertained the same opinion.[78]

This rule was undoubtedly based upon the theory that there were correlative rights to be protected by reservation clauses in the mineral patent—a rule which the courts declined to follow.[79]

It seems to us that if the premises applied for by the mineral claimant are unquestionably mineral in character, they could not (except in the absence of a location within incorporated towns under the act of March 3, 1891) be acquired under the townsite laws. The prior occupation for residence and business purposes could not prevent the appropriation of such lands under the mining laws.[80] There could be no "horizontal partition" between the mineral and townsite claimant.[81] A townsite occupant could have no legal right of possession to lands whose mineral character was known or discovered prior to the townsite entry; consequently he could have no adverse claim, in contemplation of the law, to the title of the mineral applicant, and the only theory on which he could possibly have a right to adverse is that announced in Clipper Min. Co. v. Eli Min. & Land Co.,[82] where a lode claimant should attempt to initiate a right based on a forcible trespass and invasion of the townsite claimant's possession. The relative position of the parties is parallel to the

556; Ester v. Townsite of Cooke, 4 L. D. 212; Smokehouse Lode Cases, 4 L. D. 555; In re Starr, 2 L. D. 759.

[78] Talbott v. King, 6 Mont. 76, 109, 9 Pac. 434, 438; Bonner v. Meikle, 82 Fed. 697, 699, 19 Morr. Min. Rep. 83; Young v. Goldsteen, 97 Fed. 303, 305. Of these two latter cases the secretary of the interior has said: "They are not only not of binding authority here but are not persuasive." Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495.

[79] *Ante*, § 171.

[80] *Ante*, § 170.

[81] *Ante*, § 171.

[82] 194 U. S. 220, 231, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

case of a known lode embraced within a placer, which is unclaimed by the placer owner—a subject discussed in a previous section.[83]

If an adverse claim were filed and prosecuted by a townsite claimant, ordinarily, in the absence of a forcible entry by the lode claimant, the crucial question would be the character of the land; and this is a question the determination of which is confided to the land department, and not to the courts.[84]

The latest expression of opinion of the department on this subject is as follows:—

> The mining laws do not authorize or provide for adverse proceedings against an applicant for patent to mineral land by one claiming the same or any part thereof under laws providing for the disposal of nonmineral land. The provisions of sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six relative to adverse claims contemplate proceedings to determine only the right of possession as between mineral claimants of the same unpatented mineral lands, and not to decide controversies respecting the character of public lands,—that is, whether they are mineral or nonmineral.[85]

The supreme court of the United States has also held that:—

> Adverse proceedings are called for only where one mineral claimant contests the right of another mineral claimant.[86]

[83] *Ante*, § 721.

[84] *Ante*, § 108.

[85] Ryan v. Granite Hill M. & D. Co., 29 L. D. 522. See, also, Harkrader v. Goldstein, 31 L. D. 87; Lalande v. Townsite of Saltese, 32 L. D. 211; Helena & Livingston S. & R. Co. v. Dailey, 36 L. D. 144; Wright v. Town of Hartville, 13 Wyo. 497, 81 Pac. 649, 651, quoting this section with approval; Low v. Katalla Co., 40 L. D. 534, 538.

[86] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 360, 25 Sup. Ct. Rep. 266, 49 L. ed. 504.

We have heretofore intimated that in cases of incorporated cities and towns under the act of March 3, 1891, granting certain surface privileges to prior occupants of the surface of lode claims, such prior occupants are given the *status* of adverse claimants, and that to protect their rights to the surface they must file their adverse claims and pursue their remedy in the courts.[87] This upon the theory that under this law a prior surface possession of mineral land for trade or business purposes within incorporated cities is lawful, and establishes a right in hostility to the mineral claimant. This rule, however, applies only to lode claims within incorporated cities or towns. As to placers, the entire surface is necessary to the successful working of the mine. There can be no correlative rights between townsite occupants and placer claimants.

Where a townsite entry has been perfected, and patent issued, or the purchase price has been paid, we cannot see upon what principle the holder of the townsite title should be required to adverse a subsequent mineral application, assuming, for the moment, that a townsite occupant is, in contemplation of law, an adverse claimant under any circumstances. A prior placer patentee is not called upon to adverse a subsequent lode application.[88]

If a townsite patent embraces a mine whose existence was known at the date of the entry, it does not as against the owner of the mine or his grantees, pass by the patent;[89] consequently nothing could be gained by adverse proceedings instituted by the holder of the townsite title. If, on the other hand, the exist-

[87] *Ante*, § 175.
[88] *Ante*, § 718; Ryan v. Granite Hill, 29 L. D. 522.
[89] *Ante*, § 177.

ence was not known, the townsite patentee has a right to "repose quietly upon the sufficiency and validity of his patent."[90] His patent would cover it.

As to whether such a patent could be collaterally assailed in an action at law there is a diversity of opinion. We have in a previous section attempted to show the state of the law on the subject.[91]

**§ 724. Millsite claimant versus mineral applicant.** The mining laws recognize the appropriation of nonmineral public lands for millsite purposes.[92]

Such an appropriation, when completed by the user for mining or mill purposes as contemplated by law, would prevent a subsequent lode locator extending his surface boundaries within the limits of the millsite, unless the lode on its course penetrated it.

To the extent that a conflict thus arising involves only nonmineral lands, the claim to the millsite would be, in a sense, adverse to the surface claim of the locator, and the earlier departmental decisions held that a millsite claim was a proper subject for adverse proceedings,[93] but the latest expression of opinion by the department holds that sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six of the Revised Statutes do not require adverse proceedings in court by a millsite claimant in order to protect his rights as against an applicant for a patent to a mining claim, and that since the determination of the question of mineral character is exclusively within the jurisdiction of the land department, a millsite claimant can litigate all material matters relating to the owner-

[90] Iron S. M. Co. v. Campbell, 135 U. S. 286, 299, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

[91] *Ante*, § 177.

[92] *Ante*, §§ 519–524.

[93] Warren Millsite v. Copper Prince, 1 L. D. 555; Bay State Gold Min. Co. v. Trevillion, 10 L. D. 194.

ship and validity of the millsite claim as against such mineral applicant by means of a protest in the department, and that this view is supported by the very decided weight of authority on the subject.[94]

As between a prior millsite claimant and a placer applicant, the only question involved would be the character of the land. As we have heretofore observed, this is not the subject of an adverse claim, but of protest.[95]

The supreme court of Montana has announced a contrary rule,[96] basing its ruling, to some extent at least, upon the opinion of the assistant attorney-general in the case of a townsite occupant against a mineral claimant,[97]—a subject fully discussed in another section.[98]

For the reasons there set forth, we do not think the opinion referred to is based upon the correct view of the law. The character of the land is a question to be determined by the land department, and not the courts.[99]

In the case of Durgan v. Redding,[100] the claimant to a millsite applied for a patent and was adversed by a mineral claimant. In his pleading in support of the adverse claim the mineral claimant alleged the mineral character of the land and its location as such under the mining laws. The sufficiency of the complaint was attacked by demurrer. The court held that as by the demurrer the allegation of the mineral character of the

94 Helena etc. Co. v. Dailey, 36 L. D. 144. See, also, Snyder v. Waller, 25 L. D. 7, 8.

95 *Ante*, § 717.

96 Shafer v. Constans, 3 Mont. 369, 1 Morr. Min. Rep. 147.

97 Becker v. Central City Townsite, 2 Copp's L. O. 98.

98 *Ante*, § 723.

99 *Ante*, § 717.

100 103 Fed. 914, 916.

land was admitted, the pleading was sufficient as a bill to quiet title. This does not militate against the views we have heretofore expressed.

**§ 725. Tunnel proprietor versus lode applicant.**— The rights of tunnel locators and the unique position this class of locations occupy in the mining law have given rise to numerous conflicting decisions in the courts of the mining regions.[1]

Commissioner McFarland held that a tunnel location was a mining claim,[2] and to protect his rights against a lode applicant the tunnel proprietor was required to file his adverse claim and prosecute his suit thereon in the courts.[3]

This view was upheld by Secretary Kirkwood,[4] and practically accepted by the supreme court of Idaho.[5]

The supreme court of Montana announced its view that the applicant for patent ought to be restrained from prosecuting his proceedings while the tunnel proprietor is prosecuting his tunnel as required by law, and until it should be demonstrated that the vein would not be discovered in the tunnel, or until the tunnel rights were abandoned, thus practically giving the tunnel claimant the *status* of an adverse claimant.[6]

1 "The decisions on the question of the duty of the tunnel owner to adverse the application of the lode claimant are not harmonious." Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel etc. Co., 196 U. S. 337, 359, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

2 See Id., p. 357, holding that "a tunnel is not a mining claim, although it has sometimes been inaccurately called one."

3 Tioga Cons. M. Co., 8 Copp's L. O. 88.

4 Bodie Tunnel v. Bechtel Cons. M. Co., 1 L. D. 584, followed in Burton's Case, 29 L. D. 235.

5 Back v. Sierra Nev. Cons. M. Co., 2 Idaho, 386 (420), 17 Pac. 83, 86.

6 Hope M. Co. v. Brown, 11 Mont. 370, 28 Pac. 732, 734.

The supreme court of Colorado denied the right of a tunnel proprietor to intervene in the patent proceeding where the lode applied for had not been discovered in the tunnel, and the lode location was not on the line (width of the bore) of the tunnel;[7] but where a prior discovery had been made in the tunnel, the right of the tunnel locator to adverse a junior location of the same vein, based upon a subsequent discovery from the surface, was recognized by that court.[8]

The circuit court of appeals for the eighth circuit announced its view that as to blind and undiscovered veins which may be ultimately discovered in the tunnel, and also found within the limits of a mining claim located subsequent to the inception of the tunnel right, such mining location being based, however, on the discovery of another vein, the tunnel proprietor will not be deprived of his right to such blind vein when discovered in his tunnel, by reason of his failure to adverse the junior locator.[9]

This doctrine has received the sanction of the supreme court of the United States. Said that court:—

> The obvious contemplation of the law in respect to these adverse proceedings is, that there shall be a present tangible and certain right, and not a mere possibility.[10]

[7] Corning T. Co. v. Pell, 4 Colo. 507, 14 Morr. Min. Rep. 612.

[8] Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521, 525; affirmed, Campbell v. Ellet, 167 U. S. 116, 120, 17 Sup. Ct. Rep. 765, 42 L. ed. 101, 18 Morr. Min. Rep. 669.

[9] Enterprise M. Co. v. Rico Aspen Cons. M. Co., 66 Fed. 200, 205, 13 C. C. A. 390.

[10] Enterprise M. Co. v. Rico Aspen M. Co., 167 U. S. 108, 115, 17 Sup. Ct. Rep. 762, 42 L. ed. 96, followed in Uinta Tunnel M. & T. Co. v. Creede & Cripple Creek M. & M. Co., 119 Fed. 164, 168; affirmed on appeal, Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel etc. Co., 196 U. S. 337, 357, 25 Sup. Ct. Rep. 266, 49 L. ed. 501. This latter decision, in commenting on the Enterprise-Rico Aspen case,

The Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel etc. Co. case,[11] later decided by the same court, held that even where the line of a tunnel runs directly through the lode claim, the tunnel claimant is not called upon to adverse, for "whatever might be the propriety or advantage of such action, the statute does not require it," and that sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six of the Revised Statutes provide for a judicial determination of a conflict between two mining claims, whereas a tunnel is not a mining claim. A judgment in adverse proceedings instituted by a tunnel claimant (if such proceedings were required) and favorable to him would place a limitation on the lode patent for which there is no statutory warrant.

In the light of these decisions by the United States supreme court, the rule may be thus formulated: Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode inures to the tunnel proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant; but where there has been no discovery in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim.[12] Should a discovery of the vein be subse-

said that in that case the line of the tunnel did not enter but ran parallel to the lode claim, and that the mere possibility that a vein might be discovered in the tunnel which extended through the lode claim did not necessitate adverse proceedings.

11 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

12 The foregoing language of the text has been quoted with approval in Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel etc. Co., 196 U. S. 337, 359, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

quently made in the tunnel, the surface locator's rights will be subordinated to the rights of the tunnel proprietor, assuming, of course, that the inception of the tunnel right antedated the discovery by the surface discoverer.[13]

**§ 726. Owners of lodes located prior to May 10, 1872.**—Section sixteen of the act of May 10, 1872, substantially preserved in section twenty-three hundred and forty-four of the Revised Statutes, contained a proviso "that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

The supreme court of California has held, construing this provision, that where an application for patent was made subsequent to the passage of the act of 1872, based upon a location made prior to its passage, the claimant of another vein found within the surface limits of the ground sought to be patented, whose rights accrued under the act of 1866, was not called upon to adverse the patent application. His rights were preserved by the act under which patent proceedings were instituted.[14]

A similar rule had been previously announced by the supreme court of Utah.[15]

The supreme court of Arizona has expressed the opinion that the prior locator was required to adverse in order to protect his rights;[16] and the supreme court of Colorado gives its sanction to this doctrine so far

[13] See, also, Hope M. Co. v. Brown, 7 Mont. 550, 19 Pac. 218, 221.

[14] Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304, 306.

[15] Blake v. Butte S. M. Co., 2 Utah, 54, 9 Morr. Min. Rep. 503, Chief Justice Schaeffer dissenting.

[16] Watervale v. Leach, 4 Ariz. 34, 33 Pac. 418, 420; rule practically followed in New Dunderberg v. Old, 79 Fed. 598, 603, 25 C. C. A. 116.

as determining the ownership of ore at spaces of intersection, should the veins be cross-veins.[17]

Locations made prior to 1872 have, for the most part, either been patented, or, if not abandoned, been readjusted to conform to existing laws. The question is relatively unimportant.

§ 727. **Cross-lodes.**—We have fully discussed the subject of cross-lodes in a preceding chapter.[18] From a consideration of the authorities there noted, it must be conceded that if any rights are asserted by the junior cross-lode claimant to any ore in the vein within the vertical boundaries of the senior claim, necessarily he must adverse. If he is confessedly a junior locator, he has no standing as an adverse claimant. If the junior cross-lode locator is the applicant, the senior locator must necessarily adverse in order to protect his rights. Cross-lode locations form no exception to the general rule that wherever there is a surface conflict, the senior locator must adverse or lose his priorities as to everything within the vertical boundaries of the conflicting area, and all such asserted rights as conflict with the patent applicant.[19]

§ 728. **Co-owners.**—Where one co-owner applies for a patent in his own name to the exclusion of his cotenants, there is no doubt that the omitted associates *may* institute adverse proceedings in the land office. The application solely in behalf of one may be construed as a denial of the rights of the others, and ordinary pru-

[17] Lee v. Stahl, 9 Colo. 208, 11 Pac. 77, 78, 13 Colo. 174, 22 Pac. 436, 438, 16 Morr. Min. Rep. 152.

[18] *Ante*, §§ 557–560.

[19] For full discussion of the effect of failure to adverse, see *post*, §§ 742, 783.

dence would suggest that the omitted owners should protect their rights in the patent proceeding. Especially is this true where the excluded co-owner would run the danger of losing his rights by awaiting the issuance of patent before bringing suit because of laches, the statute of limitations or the intervention of rights of third parties.[20] But the more formidable question presented is, *Must* the cotenant who is omitted from the patent application adverse or be debarred from asserting his equities after the patent has issued?

The earlier decisions of the department enunciated the doctrine that the excluded owners were called upon to adverse, or else they were deemed to have waived their rights.[21] But later rulings repudiate this doctrine, and hold that omitted co-owners are not called upon to adverse,[22] though the department says that the practice of one cotenant applying for patent without joining his other cotenants should not be encouraged.[23]

The existing regulations recognize the right of such owners to protest against the issuance of a patent to one of several owners, and the department usually de-

20 Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 697, 4 L. R. A., N. S., 1126.

21 Mono M. Co. v. Magnolia E. & W. Co., 2 Copp's L. O. 68; In re Peck, 10 Copp's L. O. 119; In re Cunningham, 10 Copp's L. O. 206; Grampian Lode, 1 L. D. 544; Hussey Lode, 5 L. D. 93; Monitor Lode, 18 L. D. 358.

22 Thomas v. Elling, 25 L. D. 495; S. C., on review, 26 L. D. 220; Coleman v. Homestake M. Co., 30 L. D. 364; In re Ritter, 37 L. D. 715, 717; Gen. Min. Reg., par. 53, Appendix.

23 In re Ritter, 37 L. D. 715, 718, overruling Lackawanna Placer Claim, 36 L. D. 36, which latter decision gave as one of the reasons for rejecting an application the fact that if all co-owners were not parties to an application for patent, adverse claimants would be placed at a disadvantage in bringing suit. The Ritter case (p. 717) held that the adverse claimant should make all pretermitted co-owners parties defendant in his suit in court.

vises some method of forcing the recognition of these equities.[24]

If the omitted co-owner does adverse or intervene in the patent proceeding, the land department will suspend its functions to abide the event of the action.[25]

The courts generally concede the rule to be, that where one of several co-owners in a mining claim applies for a patent in his own name, the excluded cotenants are not adverse claimants within the meaning of the law requiring the filing and prosecution of adverse claims. They may assert their equities in the patent title and have the patentee declared trustee for the benefit of such co-owners as were wrongfully ignored in the patent proceeding.[26]

The statute providing for adverse claims has reference to an adverse claim arising from independent and conflicting locations of the same ground and not to a

24 Golden and Cord Mining Claims, 31 L. D. 178; In re Ritter, 37 L. D. 715, 718.

25 Thomas v. Elling, 25 L. D. 495; S. C., on review, 26 L. D. 220.

26 Turner v. Sawyer, 150 U. S. 578, 586, 14 Sup. Ct. Rep. 192, 37 L. ed. 1189, 17 Morr. Min. Rep. 683; Lockhart v. Johnson, 181 U. S. 516, 528, 21 Sup. Ct. Rep. 665, 45 L. ed. 979; Lockhart v. Leeds, 195 U. S. 427, 438, 25 Sup. Ct. Rep. 76, 49 L. ed. 263, discussing trusts *ex maleficio;* Mills v. Hart, 24 Colo. 505, 65 Am. St. Rep. 241, 52 Pac. 680, 681; Malaby v. Rice, 15 Colo. App. 364, 62 Pac. 228; McCarthy v. Speed, 12 S. D. 7, 80 N. W. 135; Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698; Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1067; Sussenbach v. First National Bank, 5 Dak. 477, 41 N. W. 662, 668; Doherty v. Morris, 11 Colo. 12, 16 Pac. 911, 912; Hunt v. Patchin, 13 Saw. 304, 309, 35 Fed. 816, 818; Ballard v. Golob, 34 Colo. 417, 83 Pac. 376, 379; Stephens v. Golob, 34 Colo. 429, 83 Pac. 381; Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 696, 4 L. R. A., N. S., 1126; Delmoe v. Long, 35 Mont. 139, 88 Pac. 778, 781; Stevens v. Grand Central M. Co., 133 Fed. 28, 30, 67 C. C. A. 284; Allen v. Blanche Gold M. Co., 46 Colo. 199, 102 Pac. 1072, 1073; Van Sice v. Ibex Min. Co., 173 Fed. 895, 897, 97 C. C. A. 587; *certiorari* denied, 215 U. S. 607, 30 Sup Ct. Rep. 408, 54 L. ed. 346; appeal dismissed, 223 U. S. 712, 32 Sup. Ct. Rep. 520, 56 L. ed. 625; *ante,* § 406.

controversy between co-owners or others claiming under the same location.[27]

At the same time, since the department is finally the judge of what is or is not the subject of an adverse claim, and as that department has the practical control of the situation and by its regulations provides for the litigation in the courts, the latter lean to an encouragement of the practice of filing and litigating adverse rights by the omitted cotenant instead of compelling such cotenant to await the issuance of patent,[28] and where the department will suspend action pending the result of the litigation, it makes but little difference whether or not the suit is ear-marked as arising out of a patent proceeding.

In a preceding section,[29] we have commented upon the subject of forfeiture to co-owners under section twenty-three hundred and twenty-four of the Revised Statutes, and have there intimated, following the suggestions made by Judge Elliott in his concurring opinion in Tabor v. Sullivan,[30] that under certain circumstances, where the claim is held by one co-owner in open hostility to the others, and there is a well-recognized repudiation of title brought to the notice of the excluded cotenants, their rights may be lost by failure to adverse.

If prior to the institution of the patent proceedings there had been such an ouster of a cotenant as would set the statute of limitations in motion, such a notorious and unequivocal denial of a cotenant's rights

27 Stevens v. Grand Central M. Co., 133 Fed. 28, 31, 67 C. C. A. 284. See, also, In re Ritter, 37 L. D. 715.

28 Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 697, 4 L. R. A., N. S., 1126.

29 *Ante*, § 646.

30 12 Colo. 136, 151, 20 Pac. 437.

brought to his notice as to impose upon such cotenant the necessity of protecting his interest [31]—such conduct by the co-owner in possession which in law creates an adverse holding—we think the courts would compel the ousted cotenant to assert his rights in the patent proceedings.

What acts are necessary to constitute such an ouster and change the possession of one co-owner into an adverse holding against another must be determined by the general law of cotenancy. It is not within the legitimate scope of this treatise to determine such collateral questions.

§ 729. **Easements.**—Patents when issued are issued subject to accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under, or recognized by, the laws of congress. Such rights furnish no ground for an adverse claim, for they are not "mining claims." [32] They are fully protected by the provisions of the federal law.[33]

The parties are not rival mining claimants, and to such only the law on the subject of adverse claims applies.[34]

The same may be said of public highways. The right of all parties to use the highway will be as secure

31 Freeman on Cotenancy, § 229; Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 697, 4 L. R. A., N. S., 1126.

32 Creede etc. M. Co. v. Uinta Tunnel etc. Co., 196 U. S. 337, 358, 359, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

33 Rev. Stats., §§ 2339, 2340; 16 Stat. 218; Comp. Stats. 1901, p. 1437; 5 Fed. Stats. Ann. 53; 14 Stat. 253; Comp. Stats. 1901, p. 1437; Rockwell v. Graham, 9 Colo. 36, 10 Pac. 284, 15 Morr. Min. Rep. 299.

34 *Ante*, § 717.

under the law as if title had remained in the government.[35]

An analogous rule is applied to conflicts between railroad rights of way and mining claims.[36]

**§ 730. Underground conflicts.**[37]—An application for patent invites only such contests as affect the surface area. A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such a condition arises, it is adjusted by reference to surface apex ownership and priority of location.[38]

The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict.[39] Prospective underground conflicts or questions involving extralateral rights are not the subject of adverse claims.[40]

[35] Copp's Min. Dec. 76; Rev. Stats., § 2477; 14 Stat. 253; Comp. Stats. 1901, p. 1567; 6 Fed. Stats. Ann. 498; on subjects of easements generally, see *ante*, § 530.

[36] Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495.

[37] The text of this section as it appeared in the second edition was quoted with approval in Lawson v. United States M. Co., 207 U. S. 1, 16, 28 Sup. Ct. Rep. 15, 52 L. ed. 65.

[38] Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 82, 16 Pac. 513, 16 Morr. Min. Rep. 145; Hickey v. Anaconda Copper M. Co., 33 Mont. 46, 81 Pac. 806, 811.

[39] New York Hill Co. v. Rocky Bar Co., 6 L. D. 318; Smuggler M. Co. v. Trueworthy Lode Claim, 19 L. D. 356; Chollar Potosi & Bullion M. Co. v. Julia G. & S. M. Co., Copp's Min. Lands, 93, Copp's Min. Dec. 101; Julia G. & S. M. Co., Copp's Min. Dec. 96; Saratoga Lode v. Bulldozer Lode, Sickle's Min. Dec. 252; In re Mt. Joy Lode, Copp's Min. Dec. 27; Eureka M. Co. v. Pioneer Cons. M. Co., 8 Copp's L. O. 106; Woods v. Holden, 26 L. D. 198.

[40] Beik v. Nickerson, 29 L. D. 662; Bunker Hill Co. v. Shoshone M. Co., 33 L. D. 142, 149; Round Mt. M. Co. v. Round Mountain Sphinx Co. (Nev.), 129 Pac. 308, 312, 313.

This rule was applied by analogy to conflicting or interlocking extralateral rights although there is a surface conflict. The failure to adverse will not bar the assertion of priority in a subsequent suit to adjust extralateral rights.[41]

**§ 731. Parties relocating after period of publication.**—It is hardly necessary to suggest that parties relocating after the period of publication have no standing as adverse claimants.[42] If pending the patent proceeding the applicant fails to perform his annual labor, the ground becomes subject to relocation, but after the period of publication has elapsed, such relocator cannot inject himself into the patent proceeding. His remedy is in the courts.[43]

Necessarily such relocation based upon the original applicant's failure to perform the necessary statutory work must have been perfected prior to the culmination of the patent proceeding and the issuance of the certificate of purchase,[44] provided, of course, that the entry is not void by reason of some vital defect in the patent proceedings affecting the jurisdiction of the

[41] United States Min. Co. v. Lawson, 134 Fed. 769, 772, 67 C. C. A. 587; affirmed, Lawson v. United States Min. Co., 207 U. S. 1, 16, 28 Sup. Ct. Rep. 15, 52 L. ed. 65. This, in effect, is opposed to the ruling of the ninth federal circuit court of appeals in the first Stemwinder case, Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. Co., 114 Fed. 420, 52 C. C. A. 222, 22 Morr. Min. Rep. 132, reversing Bunker Hill & S. M. Co. v. Empire State-Idaho M. & D. Co., 108 Fed. 189, 194.

[42] Woodman v. McGilvary, 39 L. D. 574; Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 786.

[43] Gillis v. Downey, 85 Fed. 483, 488, 29 C. C. A. 286; Cain v. Addenda M. Co., 29 L. D. 62; Barklage v. Russell, 29 L. D. 401; Marburg Lode, 30 L. D. 202; Cleveland v. Eureka No. 1 G. M. & M. Co., 31 L. D. 69; Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 786.

[44] Neilson v. Champagne M. & M. Co., 119 Fed. 123, 125, 55 C. C. A. 576.

local officers to issue the certificate. In such cases an order directing proceedings *de novo* will be treated as a cancellation of the entry, rendering the claim subject to relocation at any time after the order, provided the annual labor has not been performed or resumed prior to such adverse relocation. In such a case the formal cancellation of the certificate is not essential.[45]

The land department may recognize a protest presented to it by a relocator whose asserted rights arise pending the patent proceedings, to the extent of inquiring as to whether or no the proceeding has been prosecuted with reasonable diligence, and if such be the fact, it may dismiss the patent application.[46] But beyond this the relocator must appeal to the courts for the maintenance of his rights.

## Article III. How, When, and Where Adverse Claim Must be Asserted.

§ 734. Adverse claim—How asserted—Contents of the claim—Amendments.
§ 735. Survey of the adverse claim.
§ 736. Verification of the claim.
§ 737. Sufficiency of adverse claim to be determined by land department.
§ 738. When adverse claim must be filed—Time how computed.

[45] Southern Cross G. M. Co. v. Sexton, 31 L. D. 415. This ruling giving retroactive effect to the order of cancellation was nullified by the supreme court of California. Southern Cross G. M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423, 424. For comment on this decision, see Juno et al. Lodes, 37 L. D. 365. In Adams v. Polglase, 32 L. D. 477 (S. C., on review, 33 L. D. 30), the secretary held that a relocation made after entry and prior to its cancellation would become effective on such cancellatien. But this is opposed to the correct doctrine announced in Brown v. Gurney, 201 U. S. 184, 193, 26 Sup. Ct. Rep. 509, 50 L. ed. 717, and in Southern Cross G. M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423, 424, to the effect that an entry while uncanceled withdraws the land embraced in it so effectually that a hostile claimant cannot initiate an adverse title which will be of any avail after the entry has been canceled.

[46] *Ante*, § 696.

§ 739. Where adverse claim must be filed.
§ 740. But one adverse claim need be filed.
§ 741. Filing of adverse claim suspends the powers of the land department.
§ 742. Effect of failure to file an adverse claim.

**§ 734. Adverse claim—How asserted—Contents of the claim—Amendments.**—The law requires that the instrument by which the adverse claim is asserted shall show the nature, boundaries, and extent of such claim.[1] This is supplemented by the following regulation of the department. The adverse notice must fully set forth,—

> The nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished; or if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.[2]

The object to be accomplished, as was said by Assistant Attorney-General Smith,[3] is to fairly advise the applicant of the nature, boundaries, and extent of the adverse claim, so that he may prepare himself to establish, on the trial before the courts, his own rights, and defeat the adverse claim.[4]

[1] Rev. Stats., § 2326; 17 Stats. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35.

[2] Gen. Min. Reg., par. 81, Appendix.

[3] Sickle's Min. Dec. 232.

[4] McFadden v. Mountain View M. & M. Co. (on review), 27 L. D. 358; Kinney v. Van Bokern, 29 L. D. 460.

The instrument should show the qualification of the claimant and such facts from which, assuming them to be true, the inference may be clearly deduced that the party asserting the adverse claim has the right of possession to a valid subsisting mining claim, a portion at least of which conflicts with the tract embraced within the pending application. The sufficiency of the adverse claim as filed should be tested by the ordinary rules of pleading, where a general demurrer is interposed to a complaint.[5]

If such adverse claimant asserts a right to a patent, he must set forth in his claim all the facts necessary to establish such right. For example, the expenditure of five hundred dollars in betterments or improvements, while it is not a prerequisite to the filing of an adverse claim, is a condition precedent to the issuance of a patent. Therefore, when such adverse claimant seeks a patent as the result of a successful prosecution of his claim, he should aver compliance with the law in this behalf.

While the land department may be satisfied with a less complete statement of the adverse claim than that herein suggested, the general principle herein announced is unquestionably the correct one, and should be followed.

When an adverse claim has once been filed, it cannot be amended after the period of publication has elapsed, so as to embrace a larger portion of the premises applied for than that described in the original adverse claim;[6] but during the period of publication, there is no reason why the adverse claimant should not

[5] Robinson v. Mayger, 9 Copp's L. O. 5, 1 L. D. 538; City Rock & Utah v. Pitts, 1 Copp's L. O. 146.

[6] Copp's Min. Dec. 156.

be permitted to correct inaccuracies and errors in the original by filing an amended claim.

Where the adverse claimant asserts rights under two separate conflicting claims which do not conflict with each other, he may file two separate adverse claims and maintain two separate suits.[7]

**§ 735. Survey of the adverse claim.**—In order that the "boundaries" and "extent" of the claim may be shown, the regulations of the department[8] require the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made by a surveyor, not necessarily one holding an appointment as deputy mineral surveyor,[9] although the land department suggests the propriety of having it made from an actual survey by such deputy, who should officially certify to its correctness.[10]

When the adverse claimant asserts an adverse right to the whole of the tract applied for by the identical metes and bounds of the patent survey, such, for instance, as an excluded co-owner, or a purchaser at a tax or execution sale, claiming to have succeeded to the entire title of the applicant by an instrument which would not carry the subsequently acquired patent title, no survey would be required. There would be no surface conflict requiring delineation.

So, also, where an application for patent describes the claim by legal subdivisions, as in ordinary cases of placers upon surveyed lands,[11] the adverse claimant,

7 Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 965.

8 Gen. Min. Reg., par. 82, Appendix.

9 Anchor v. Howe, 50 Fed. 366; McFadden v. Mountain View M. & M. Co. (on review), 27 L. D. 358; Kinney v. Van Bokern, 29 L. D. 460.

10 Gen. Min. Reg., par. 82, Appendix.

11 *Ante*, §§ 672, 700.

if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat.[12]

In some instances, where a survey of the adverse claim is impossible by reason of climatic conditions or the depth of snow during the time within which the adverse right must be asserted,[13] or where the patent applicant obstructs the adverse claimant and prevents the making of a proper survey,[14] the suggestion of an actual survey contained in the departmental regulations may be safely disregarded, and the adverse claimant may make such showing as the circumstances of the case will permit, setting forth fully in his claim as filed the reasons why the rule is not complied with.

The survey of the adverse claim is not made under the supervision of the surveyor-general, nor is the work of the deputy mineral surveyor platted in the surveyor-general's office. Nevertheless, the survey, if made, should be made and platted with the same care, and the field-notes should be as full, as in cases of patent surveys. Otherwise, in case the adverse claimants prevail in their suit, and succeed in establishing their right to the conflict area, the land officers will not be able from the data furnished to so describe the conflict area as to except it from the patent to the applicant. The applicant would be compelled to go into the field and resurvey the conflict. Ordinarily he is required by the department to do this; but the neces-

12 Gen. Min. Reg., par. 82, Appendix; Dieckman v. Good Return M. Co., 14 Copp's L. O. 237.

13 Hoffman v. Beecher, 12 Mont. 489, 31 Pac. 92, 17 Morr. Min. Rep. 503; Philadelphia M. Co. v. Finley, 10 Copp's L. O. 340; In re Wallace, 1 L. D. 582, 8 Copp's L. O. 188.

14 In re Jenny Lind M. Co., Sickle's Min. Dec. 223, 227. See, also, unreported cases cited in Clark, Heltman, and Consaul's Min. Land Digest, p. 293, par. 134.

sity for this, it seems to us, might be obviated if the adverse claim is properly surveyed, platted, and described in the first instance.

Whether or not the successful adverse claimant may proceed to patent, after the termination of judicial proceedings, without the publication and posting required in the case of original applications, will be considered in a subsequent section.[15]

**§ 736. Verification of the claim.**—The adverse claim may be verified by the person or persons making the same,[16] or by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated, such agent or attorney presenting proof of his power to act in this behalf.[17] The oath must be taken in the land district,[18] excepting where the adverse claimant is a nonresident, or is absent from the limits of the district wherein the claim is situated, in which case he may make oath to the adverse claim before the clerk of any court of record of the United States, or of the state or territory where the claimant may then be, or before any notary public of such state or territory.[19]

15 *Post*, § 764.

16 Rev. Stats., § 2326; 17 Stats. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35.

17 Act of April 26, 1882, 22 Stats. at Large, 49; Comp. Stats. 1901, p. 1431; 5 Fed. Stats. Ann. 13.

18 Gen. Min. Reg., par. 80, Appendix; Rev. Stats., § 2335; Mattes v. Treasury Tunnel M. & R. Co. (on review), 34 L. D. 314; Melford Metal Mines I. Co., 35 L. D. 174; El Paso Brick Co., 37 L. D. 155. See, also, *ante*, § 682.

19 Act of April 26, 1882, 22 Stats. at Large, 49; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35; Circ. Instructions, 1 L. D. 685. This is the rule as to all oaths necessary to be taken in the patent proceedings with such exceptions only as are stated in the statutes. See *ante*, § 682.

The oath must be taken before, i. e., in the presence of, a qualified officer, and an oath taken over the telephone does not meet these requirements, and is void.[20]

A corporation is a citizen and resident of the state under the laws of which it is incorporated, and the oath to an adverse claim made by the president of a Colorado corporation before an officer in Kentucky, where the president then was, is a nullity.[21]

Where the verification is made by an agent or attorney in fact, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.[22]

This necessarily implies the production of a written instrument or certified copy thereof, showing the designation and appointment of the agent.

In cases of corporations, the verification may be made by any of its officers selected, or an agent specially designated for that purpose. The authority to act for the corporation must be shown,[23] and is usually evidenced by a copy of the resolution of the board of directors, or other governing body, duly certified by the secretary under the corporate seal.

An adverse claim filed by, or on behalf of, a number of persons claiming an interest as cotenants, may be verified by one in behalf of all.[24]

[20] Mattes v. Treasury T. & M. Co., 33 L. D. 553, citing Sullivan v. First Nat. Bank, 37 Tex. Civ. App. 228, 83 S. W. 421, 422. See, also, Fairbanks-Morse Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331, 332.

[21] Louisville G. M. Co. v. Hayman, 33 L. D. 680.

[22] Gen. Min. Reg., par. 79, Appendix.

[23] Hawley Cons. M. Co. v. Memmon M. Co., Sickle's Min. Dec. 235, 2 Copp's L. O. 178.

[24] Jenny Lind M. Co. v. Eureka M. Co., Sickle's Min. Dec. 223; Copp's Min. Dec. 19, 175.

In this respect the rules announced with regard to patent applications[25] by co-owners apply with equal force to adverse claims asserted by them.

**§ 737. Sufficiency of adverse claim to be determined by land department.**—The objection to the sufficiency of the adverse claim is one that is to be raised before and determined by the land department.[26]

Matters of form are decided by the department. The merits are to be tried by the courts.[27]

Ordinarily, however, after suit has been commenced in support of the adverse claim, the land department is disinclined to entertain an attack upon the sufficiency of the claim as filed, relegating all the questions to the courts.[28] But unless the land department would in some substantial manner be aided by the determination of the suit, its pendency will be disregarded, and patent will issue when the defect in the adverse claim as filed is vital.[29]

If, upon objection taken to the sufficiency of the adverse claim, it is rejected by the local officers, the adverse claimant has a right of appeal.

If the objection is not sustained, the applicant for patent may prosecute an appeal to the commissioner.[30]

[25] *Ante*, § 681.

[26] Rose v. Richmond M. Co., 17 Nev. 25, 55, 27 Pac. 1105, 1110; affirmed, Richmond M. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Hoffman v. Beecher, 12 Mont. 489, 497, 31 Pac. 92, 93, 17 Morr. Min. Rep. 503; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 1042, 18 Morr. Min. Rep. 68; Tilden v. Intervenor M. Co., 1 L. D. 572, 9 Copp's L. O. 93; War Eagle Mine, Copp's Min. Dec. 195.

[27] Chambers v. Pitts, 3 Copp's L. O. 162; City Rock & Utah v. Pitts, 1 Copp's L. O. 146.

[28] McMaster's Appeal, 2 L. D. 706, 707; Reed v. Hoyt, 1 L. D. 603; Brown v. Bond, 11 L. D. 150, 154.

[29] Mattes v. Treasury Tunnel M. & R. Co., 33 L. D. 553. See § 755, *post*.

[30] Overman v. Dardanelles M. Co., Copp's Min. Dec. 181.

The question as to whether the time to commence the action runs pending such appeals has been decided both ways by the department. In one case, upon an appeal from a decision rejecting the adverse claim, where the decision was reversed and the claim ordered filed, the adverse claimant was allowed thirty days after notice of the decision on appeal within which to commence suit, thus practically suspending the operation of the statute pending the appeal.[31]

In a later case, however, Secretary Smith ruled that delay by the adverse claimant beyond the date which marked the close of the thirty days allowed him by statute was at his peril. The dismissal of his adverse claim for any cause by the local officers could not excuse the delay,[32] nor would the refusal of the local officers to accept for filing a tendered adverse claim dispense with the necessity of commencing the suit within the statutory period.[33]

The practice on the subject is involved in some obscurity. The department insists that it has the abstract right to determine the sufficiency of the adverse claim, and the courts not only concede this, but hold that the department has the exclusive privilege. After a suit has been commenced, the department relegates this question to the courts, who hold that they have no power to determine it.

It is not difficult to outline the safest course. Where an adverse claim is filed, it is incumbent upon the claimant to commence his action within the statutory period, whether the sufficiency of the claim is assailed before the department or not. Where the suit has been commenced, the department should, as it gener-

31 Hawkeye Placer v. Gray Eagle Placer, 15 L. D. 45, 47.

32 Scott v. Maloney, 22 L. D. 274.

33 Deniss v. Suinott, 35 L. D. 304.

ally does, suspend further proceedings; otherwise the patent when issued may be treated as void for want of jurisdiction,[34] unless, as has been suggested, the adverse claimant in the meanwhile dismisses his suit.[35]

**§ 738. When adverse claim must be filed—Time, how computed.**—Adverse claims, except in Alaska, to be effectual for the purposes contemplated by law must be filed prior to the expiration of the sixty-day period of publication of the application notice.[36] In Alaska an adverse claim may be filed during the period of publication or within eight months thereafter.[37] Notices of mineral applications which are required to be posted and published contain in themselves no words of citation, and do not purport by their own terms to fix the time for adverse action. Following the language of the statute, such a publication is simply a notice that such application has been made, and the statute constitutes the citation and fixes the time for adverse action.[38]

Therefore, the fact that the expiration of the period of publication is erroneously stated in a foot-note appended to the published notice will not excuse an adverse claimant from filing his adverse claim within the period fixed by the statute.[39]

[34] Richmond M. Co. v. Rose, 114 U. S. 576, 584, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273.

[35] Deno v. Griffin, 20 Nev. 249, 20 Pac. 308, 309.

[36] Helbert v. Tatem, 34 Mont. 3, 85 Pac. 733.

[37] Circular Instructions, 39 L. D. 50. See p. 61, Mining Regulations, edition of November 6, 1912; 36 Stats. at Large, 459; Comp. Stats. (Supp. 1911), p. 610; 1 Fed. Stats. Ann. (Supp. 1912), 13.

[38] Draper v. Wells, 25 L. D. 550; Davidson v. Eliza G. M. Co., 28 L. D. 550.

[39] Draper v. Wells, 25 L. D. 550. See, also, Bonesell v. McNider, 13 L. D. 286; Davidson v. Eliza G. M. Co., 28 L. D. 550.

Parties deposit adverse claims in the mails at their own risk. If they fail to reach the register within the statutory time, they cannot be recognized. The failure of the postal authorities to deliver to the register is no excuse.[40]

As we have heretofore noted,[41] when a publication is ordered in a weekly newspaper, nine consecutive insertions are necessary, the first day of insertion being excluded in estimating the sixty days.[42] The adverse claim, however, must be filed within the *sixty* days. Such a claim filed on the sixty-second day has been held to be too late.[43]

The department at one time held that a filing on or before the sixty-third day was within the time.[44]

This requirement as to time is mandatory and jurisdictional.[45]

It is a short statute of limitations, and there is no authority, either judicial or executive, to extend or abridge the period;[46] nor is it subject to extension by act of the parties. It is wholly beyond their control.[47]

[40] Gross v. Hughes, 29 L. D. 467, 470.

[41] *Ante*, § 690.

[42] Gen. Min. Reg., par. 45, Appendix.

[43] Hunt v. Eureka Gulch M. Co., 14 Colo. 451, 24 Pac. 550, 551; Miner v. Mariott, 2 L. D. 709, 10 Copp's L. O. 339; Ground Hog Lode v. Parole and Morning Star Lodes, 8 L. D. 430; Nettie Lode v. Texas Lode, 14 L. D. 180; Ledger Lode, 16 L. D. 101; Bonesell v. McNider, 13 L. D. 286; Great Western Lode, 5 L. D. 510, 14 Copp's L. O. 27.

[44] Acting Commrs. Letter, 2 Copp's L. O. 164; Miner v. Mariott, *supra*.

[45] Tiernan v. Salt Lake M. Co., 1 Copp's L. O. 25; Equator M. & S. Co., 2 Copp's L. O. 114.

[46] Tilden v. Intervenor M. Co., 1 L. D. 572, 9 Copp's L. O. 93; Gross v. Hughes, 29 L. D. 467; Holman v. Central Montana Mines Co., 34 L. D. 568.

[47] Hunt v. Eureka Gulch M. Co., 14 Colo. 451, 24 Pac. 550, 551; In re Hagland, 1 L. D. 591, 11 Copp's L. O. 102; Morrison v. Lincoln M. Co., 6 Copp's L. O. 105, Sickle's Min. Dec. 208; In re Independence Lode, 9 L. D. 571.

The fact that the publication of the notice is prolonged beyond the period prescribed by the statute will not extend the time to file the adverse claim.[48]

In computing the sixty-day period, the date of the first publication is excluded.[49]

At one time it was held that if the sixtieth day falls upon Sunday, or upon a day set apart by the laws of the state as a legal holiday, the adverse claimant would have all the next business day within which to file his claim.[50]

This ruling has been abrogated, however, and the cases upon which it rests have been expressly overruled, so that when the last day for filing an adverse claim falls on Sunday or a holiday, it is too late to file it the day following.[51]

As noted in a preceding section,[52] there are three complementary and concurrent methods of giving notice to adverse claimants,—viz., posting on the ground, posting in the register's office, and publication in the newspaper. As we have heretofore outlined in the patent proceeding,[53] the posting on the ground precedes the filing of the patent application. Posting in the register's office usually either precedes or is contemporaneous with the first publication, but this is not always the case. Where there is a failure to post the notice, either on the ground or in the local land office,

[48] Draper v. Wells, 25 L. D. 550.

[49] Gen. Min. Reg., par. 45, Appendix; Waterhouse v. Scott, 13 L. D. 718; Miner v. Mariott, 2 L. D. 709, 10 Copp's L. O. 339; Bonesell v. McNider, 13 L. D. 286.

[50] Waterhouse v. Scott, 13 L. D. 718; Ground Hog Lode v. Parole and Morning Star Lodes, 8 L. D. 430.

[51] Holman v. Central Montana Mines Co., 34 L. D. 568. This question was raised but not decided in Helbert v. Tatem, 34 Mont. 3, 85 Pac. 733, 734.

[52] *Ante*, § 691.

[53] *Ante*, §§ 677–695.

the period of publication does not commence to run until such posting is effected.

The rule is thus stated by Acting Secretary Muldrow:—

> When notice is required to be given by different forms and modes, to cover the same continuous period of time, notice by either of the different modes will not run against an adverse claimant until notice has been given by each and every mode and form required. An adverse claimant does not take notice by publication until notice is posted in the local office, as required by law, although publication may have commenced prior to the filing of notice in the local office. The sixty days within which adverse claims may be filed will be computed from the time when notice has been given by all the modes required.[54]

If, after posting in the land office, and during the period of publication, the land office should be closed, the period during which it remains closed is permitted by the department to be deducted in computing the period of publication. The time would again commence to run upon reopening the office, or, in case the office is removed to another locality, upon posting in the new office when opened for the transaction of business.[55]

When, during the vacancy in the office of register, a notice is published under the direction of the receiver acting as register under instructions from the land department, it has been held that as the receiver is a *de facto* officer, the publication will be held valid, although the instructions of the department were not authorized by law.[56]

54 Great Western Lode Claim, 5 L. D. 510, 14 Copp's L. O. 27.

55 Tilden v. Intervenor M. Co., 1 L. D. 572, 9 Copp's L. O. 93.

56 Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 352, 353, 15 Morr. Min. Rep. 575.

When, by reason of substantial defects in either posting or publishing the notice, a new notice is required to be given, adverse claimants will have sixty days from the first publication of the new notice in which to file their adverse claims.[57]

The time when an adverse right originates is a matter of no moment;[58] provided, of course, that it arises prior to the termination of the period of publication.

An adverse claim filed after the period of publication may be treated by the department as a protest, the merits of which are to be determined exclusively by the land department, without reference to the courts;[59] or it may be wholly ignored by the department, and the adverse claimant be relegated to the courts for the adjudication of his rights without necessarily impeding the orderly progress of the patent proceeding.

**§ 739. Where adverse claim must be filed.**—An adverse mining claim must be filed with the register and receiver of the land office where the application for patent was filed, or with the register and receiver of the land office in which the land is situated at the time of filing the adverse claim.[60]

The general circular issued by the land department which, among other things, outlines the duties of the local land officers, contains the following provisions:—

> They [the register and receiver] will be in attendance at their offices, keeping the same open for the

[57] In re American Flag Lode, 6 L. D. 320; Wheeler v. Smith, 23 L. D. 395.

[58] Ovens v. Stephens, 2 L. D. 699, 9 Copp's L. O. 190.

[59] Nettie Lode v. Texas Lode, 14 L. D. 180; Bodie Tunnel v. Bechtel Cons. M. Co., 1 L. D. 584; McGarrahan v. New Idria M. Co., 3 L. D. 422, 11 Copp's L. O. 370; Opie v. Auburn G. M. & M. Co., 29 L. D. 230.

[60] Gen. Min. Reg., par. 78, Appendix.

transaction of business from nine A. M. till four P. M.

Applications to make entry cannot be received by the register or receiver out of office hours, nor elsewhere than at their offices.[61]

Commenting on this, the secretary of the interior has said:—

While there is no statute forbidding their so acting, there is no statute so authorizing them to act. The regulations for their conduct not in contravention of statute have all the force of law. If it is optional with local officers to receive or decline applications, there is given opportunity for them to exercise favoritism and partiality, which might lead to grave mischiefs, the injury of many, and give occasion for grave scandals against the integrity of the land department.

The regulation is therefore wholesome, salutary, and a necessary rule not to be departed from.[62]

By analogy, adverse claims should be delivered to the local officers at their office, and during office hours, although the department has heretofore held that a delivery to either of the land officers outside of business hours and on a Sunday, and at a place other than the land office itself, was sufficient when the officers received it and it was acted upon.[63]

Such officers are not expected to transact business out of office hours, nor on Sundays, and a tender to them of an adverse claim and their refusal to accept under such circumstances would not be considered equivalent to a filing.

61 Gen. Circular, July 11, 1899, p. 38.

62 Little v. Bradbury (not reported).

63 Sayer v. Hoosac Cons. G. & S. M. Co., 6 Copp's L. O. 73; In re Jenny Lind M. Co., Sickle's Min. Dec. 223; Giroux v. Scheurman, 23 L. D. 546.

The adverse claimant must pay the fees of the land officers for filing the claim (five dollars for each officer), if such fees are demanded. Until such fees are paid or tendered, the instrument will not be considered as filed.[64]

Upon the acceptance of an adverse claim by the local officers they become chargeable with the fees required by law to be paid, but the time of actual payment thereof to said officers is not necessarily material as affecting the question of the validity of the filing of said claim.[65]

**§ 740. But one adverse claim need be filed.**—A party, after applying for a patent, cannot, after a contest is raised and while it is pending, make a second application, and thus compel the adverse claimant to protest in the latter proceeding. Having done all that the law required of him to do, the adverse claimant is entitled to have the questions at issue determined in the first proceeding. If, in disregard of this right, the department entertains a second application, and, in the absence of the assertion of an adverse claim, issues a patent, such instrument will be void for want of jurisdiction.[66]

**§ 741. Filing of adverse claim suspends the powers of the land department.**—When an adverse claim is filed within the time required by law, all proceedings

[64] Omaha G. M. Co., 3 Copp's L. O. 36. As to whether leaving the adverse claim with the officials accompanied by proper fees on a certain date is a filing on that date was mooted but not decided in Helbert v. Tatem, 34 Mont. 3, 85 Pac. 733, 734.

[65] Blake v. Toll, 29 L. D. 413.

[66] Rose v. Richmond M. Co., 17 Nev. 25, 67, 27 Pac. 1105, 1114; Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273.

upon the application in the land office, except in reference to the publication and proof of notice, are stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.[67]

Proceedings taken by the department prior to such determination or waiver are void for want of jurisdiction.[68] What constitutes such a waiver as will remove the suspension and permit the applicant to proceed to patent will be discussed in a succeeding section.[69]

Where two claims are embraced within one application, and there is no pending contest, protest, or adverse proceedings of any kind against one of the claims, patent may issue therefor on due showing of compliance with the law, without waiting for the termination of pending litigation against the other claim,[70] and where after filing an adverse claim and during the pendency of the litigation thereon the adverse claimant applies for and receives a patent for a part of his claim not in conflict with the claim embraced in the first patent application, the obtaining of

[67] Rev. Stats., § 2326; Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 277. The United States district court in the case of Duffield v. San Francisco Chemical Co. (Idaho), 198 Fed. 942, 944, where an adverse suit was filed between rival lode and placer claimants, held that the land department retained exclusive jurisdiction to determine the character of the land, whether placer or lode, but the circuit court of appeals for the eighth circuit, in another case having the same title (201 Fed. 830, 834), decided that the question as to the character of the deposit was for the court to determine, though the court held that it was not necessary to decide whether or not its conclusion would be binding on the department.

[68] Id.

[69] *Post*, § 766.

[70] Kohnyo and Fortuna Lodes, 28 L. D. 451, 562.

such patent does not operate as a waiver of the adverse claim.[71]

The pendency of proceedings in the nature of an adverse suit instituted for land excluded by the application for patent does not warrant a stay of action under a subsequent application filed by the adverse claimant for the excluded portion.[72]

**§ 742. Effect of failure to file an adverse claim.**—It is so well established as to be axiomatic that a failure to file an adverse claim within the time fixed by law operates as a waiver of all rights which were the proper subject of such a claim,[73] and where an adverse

[71] Mackay v. Fox, 121 Fed. 487, 491, 57 C. C. A. 439. See, also, *ante*, § 644.

[72] Burnside v. O'Connor, 29 L. D. 301. See, also, Little Annie No. 5 Lode Claim, 30 L. D. 488; In re Burton, 29 L. D. 235.

[73] Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Dahl v. Raunheim, 132 U. S. 260, 261, 10 Sup. Ct. Rep. 74, 33 L. ed. 324, 16 Morr. Min. Rep. 214; Eureka Case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Marshall S. M. Co. v. Kirtley, 12 Colo. 410, 21 Pac. 492, 494; Rounheim v. Dahl, 6 Mont. 167, 9 Pac. 892, 893; Lee v. Stahl, 9 Colo. 208, 11 Pac. 77, 78, 13 Colo. 174, 22 Pac. 436, 437, 16 Morr. Min. Rep. 152; Hamilton v. Southern Nev. G. & S. M. Co., 13 Saw. 113, 33 Fed. 562, 565, 15 Morr. Min. Rep. 314; Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 82, 16 Pac. 513, 514, 16 Morr. Min. Rep. 145; Hunt v. Eureka Gulch M. Co., 14 Colo. 451, 24 Pac. 550; Wight v. Dubois, 21 Fed. 693; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240, 242; Kannaugh v. Quartette M. Co., 16 Colo. 341, 27 Pac. 245, 246; Girard v. Carson, 22 Colo. 345, 44 Pac. 508, 18 Morr. Min. Rep. 346; Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178, 19 Morr. Min. Rep. 286; Golden Reward M. Co. v. Buxton M. Co., 79 Fed. 868, 873; Erwin v. Perigo, 93 Fed. 608, 609, 35 C. C. A. 482; Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1049, 22 Morr. Min. Rep. 610; S. C., in error, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119; Lily Mining Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 519; Jefferson M. Co. v. Anchoria-Leland M. & M. Co., 32 Colo. 176, 75 Pac. 1070, 1072, 64 L. R. A. 925; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278; Warren Millsite v. Copper Prince M. Co., 1 L. D. 555, 9 Copp's L. O. 71; Bodie Tunnel v. Bechtel Cons. M. Co., 1 L. D. 584; In re

claim is filed embracing an area, which is only part of the tract applied for, all right of the adverse claimant to the remainder of such tract is conclusively presumed to be waived.[74]

The issue of a patent to the applicant is equivalent to a determination by the United States in an adversary proceeding, to which the owner of the adverse right is in contemplation of law a party, that the applicant's and patentee's rights were superior, and those which might have been asserted by the holder of the adverse title were valueless.[75]

In other words, all matters which might have been tried under the adverse proceedings are treated as adjudicated in favor of the applicants, and all controversies touching the same are to be held as fully settled and disposed of, as though judgment had been regularly rendered in their favor.[76]

Where there is any surface conflict whatever and there is a failure to adverse, the issuance of the patent operates as a conclusive determination of priority in favor of the patentee as to the conflict area. To what extent this determination affects the question of underground rights in cases of interlocking extralateral

Gold Blossom, 2 L. D. 767; Branagan v. Dulaney, 2 L. D. 744, 11 Copp's L. O. 67; Manhattan M. Co. v. San Juan M. Co., 2 L. D. 698; Wight v. Tabor, 2 L. D. 738, 743, 10 Copp's L. O. 392; Southwestern M. Co. v. Gettysburg Lode, 4 L. D. 271, 12 Copp's L. O. 253; Whitman v. Haltenhoff, 19 L. D. 245; Gowdy v. Kismet G. M. Co., 22 L. D. 624; American Cons. M. & M. Co. v. De Witt, 26 L. D. 580; Mutual M. & M. Co. v. Currency M. Co., 27 L. D. 191; Stranger Lode, 28 L. D. 321.

74 Lily Mining Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 519.

75 Gwillim v. Donnellan, 115 U. S. 45, 51, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 221, 7 L. R. A., N. S., 791. Section cited *arguendo* in Hickey v. Anaconda Copper M. Co., 33 Mont. 46, 81 Pac. 806, 811.

76 Snowflake Lode, 4 L. D. 30; Petit v. Buffalo G. & S. M. Co., 9 L. D. 563.

right planes on segments of the vein lying outside of the vertical boundaries of the conflicting area has been discussed and differently decided in different courts.

The attitude of the tribunals on this question may be best illustrated by diagrams.

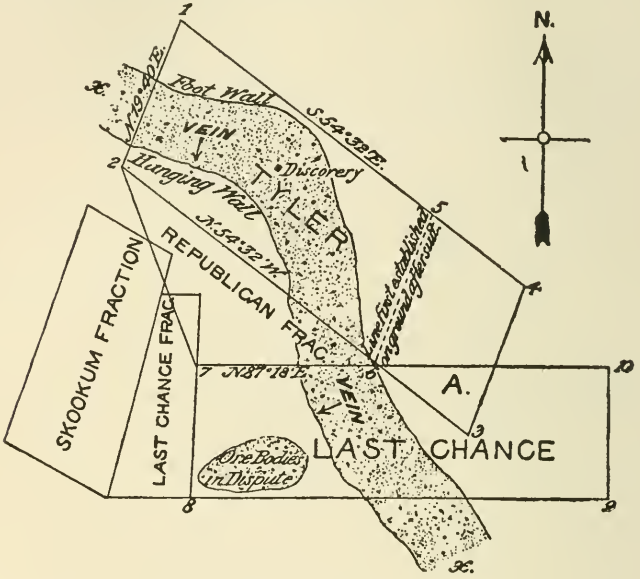



FIGURE 125A.

In Bunker Hill & Sullivan M. & C. Co. v. Empire State Idaho M. & D. Co.,[77] the facts of which are illustrated on figure 125A, there was a small triangular surface conflict between the Stemwinder and Last Chance marked A on figure 125A. The owners of the Last Chance obtained a patent, the Stemwinder having failed to adverse. A controversy subsequently arose over the right to the vein within the extralateral bounding planes of the Stemwinder beyond the triangular sur-

[77] 108 Fed. 189, 193.

face conflict. The trial court held that the failure of the owner of an adjoining claim, when the two overlap, to contest an application for patent is not an admission on his part of the priority of the location of the patented claim, which concludes and debars him from thereafter contesting the question in the courts when a controversy arises over underground parts of the vein, the rights to which must depend on priority. The court decided the question of priority in favor of the Stemwinder. The circuit court of appeals reversed the ruling as to effect of the Stemwinder's failure to adverse and held that:—

> The issuance by the government of its patent, after due notice to all the world of the application, and ample notice to everyone to contest conclusively determined, as against everyone whose surface lines conflicted therewith, the priority of that location over every other, including the Stemwinder, and conferred upon the patentees and their successors in interest not only the entire surface of the claim, but as against every one whose surface lines conflicted with those of the Last Chance, the extralateral rights conferred by section 2322 of the Revised Statutes to follow on their dip outside the side lines and within vertical planes drawn through the parallel end lines extended in their own direction, all lodes or ledges the tops or apexes of which lie inside the surface lines of the claim.[78]

In other words, the court held in effect that where there was no surface conflict, the question of priority

[78] Empire State Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 420, 421, 52 C. C. A. 219, 22 Morr. Min. Rep. 104, modifying its opinion in Bunker Hill & Sullivan M. & C. Co. v. Empire State Idaho M. & D. Co., 109 Fed. 538, 48 C. C. A. 665, 21 Morr. Min Rep. 317. The supreme court of the United States refused to issue a writ of *certiorari* to review this decision. As we shall observe later, however, this tribunal declined to follow the rule announced by the circuit court of appeals.

was not foreclosed by the issuance of the patent in controversies subsequently arising over conflicting underground rights, but where a conflict exists, however slight or inconsequential, the senior claimant must adverse the application for patent by the junior or else be forever barred from contesting the question of priority, not only as to the surface conflict area but as to all conflicting underground rights in the vein outside of and beyond the vertical boundaries of such conflict area.

The supreme court of Colorado applied this rule in Jefferson M. Co. v. Anchoria Leland M. & M. Co.,[79] and it stood practically unchallenged until the question was presented to the circuit court of appeals of the eighth circuit in United States Min. Co. v. Lawson,[80] the facts of which case as they were understood

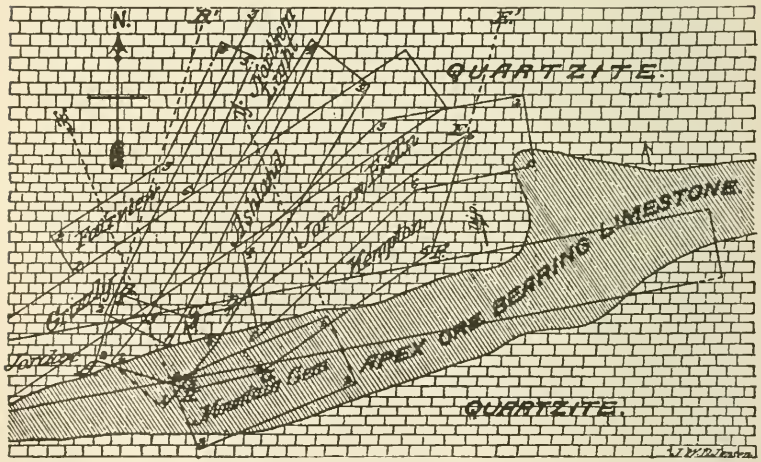



FIGURE 125B.

[79] 32 Colo. 176, 75 Pac. 1070, 1072, 64 L. R. A. 925. We have fully discussed this case in connection with a diagram—Figure 82B—in dealing with the subject of extralateral rights on secondary veins. *Ante*, § 594.

[80] 134 Fed. 769, 67 C. C. A. 587.

by the court to have been established at the trial are shown on figure 125B.

The complainant owned the Old Jordan, Mountain Gem, Jordan Extension, Grizzly, Northern Light and Fairview; the defendants owned the Kempton and Ashland. The controversy was over ore bodies lying underneath the surface of Grizzly, Northern Light and Fairview. These ore bodies belonged to a vein with a broad apex, which was bisected longitudinally by the Old Jordan, Mountain Gem, and Kempton. There was a surface conflict between the Kempton, the Mountain Gem and Old Jordan. The Kempton applied for and received a patent without, so far as the record disclosed, protest or adverse on the part of the Mountain Gem or Old Jordan. The Old Jordan and Mountain Gem were in fact older in the order of location and would take the entire width of the vein on its dip or course downward unless the superiority due to their seniority was avoided by some other controlling fact. The Kempton owners claimed that priority was established in its favor by the issuance of the patent without adverse, and that the owners of the Old Jordan and Mountain Gem were estopped from denying such priority by reason of their failure to adverse. As to this contention the circuit court of appeals said:—

> If the present suit related to the superior right to these surface areas or to any underground or extralateral rights necessarily following or incident to such surface ownership, the claim of estoppel would be well taken, but as the controversy is over a different subject matter and it is not shown that the question of priority was in fact presented and determined in the course of the patent proceedings, the estoppel cannot be maintained. . . . . Treating

the patent proceedings as involving, or as equivalent to, a controversy between these parties or their predecessors in interest and title, the subject matter of that controversy was the surface conflict between their respective claims while the present controversy is over extralateral underground rights not necessarily following the surface conflict, which is essentially a different subject matter and could not have been made the subject of an issue, trial or decision in the course of the patent proceeding.[81]

The ore bodies in dispute were awarded to the owners of the Mountain Gem and Old Jordan. The supreme court of the United States affirmed this decision and in summing up said:—

The priority of right to a single broad vein vested in the discoverer is not determined by the dates of the entries or patents of the respective claims and priority of discovery may be shown by testimony other than the entries and patents. In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface.[82]

It is apparent from the reasoning of the supreme court of the United States in this case that the Stemwinder-Last Chance case was wrongly decided by the circuit court of appeals, ninth circuit.

A failure to assert adverse rights will not estop an adverse claimant from protesting and bringing to the notice of the department such facts as tend to show noncompliance by the applicant with the requirements of the law.[83]

81 134 Fed. 769, 775, 67 C. C. A. 587.

82 Lawson v. United States M. Co., 207 U. S. 1, 19, 28 Sup. Ct. Rep. 15, 52 L. ed. 65.

83 Nevada Lode, 16 L. D. 532; Waterloo M. Co. v. Doe, 17 L. D. 111. See American Cons. M. & M. Co. v. De Witt, 26 L. D. 580; Mutual

"Adverse claims" referred to in the statute mean, of course, only such as might have been made known at the local office during the period of publication,[84] and matters arising subsequent to the filing of the adverse claim cannot be considered in such action.[85]

M. & M. Co. v. Currency M. Co., 27 L. D. 191; Cape May M. & L. Co. v. Wallace, 27 L. D. 676; Rupp v. Heirs of Healey, 38 L. D. 387.

[84] In re Wolenberg, 29 L. D. 302; Cain v. Addenda M. Co., 29 L. D. 62; Barklage v. Russell, 29 L. D. 401; Cleveland v. Eureka No. 1 G. M. & M. Co., 31 L. D. 69.

[85] Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015, 1016.

# CHAPTER V.

## ACTIONS TO DETERMINE ADVERSE CLAIMS, AND THE EFFECT OF JUDGMENT THEREON.

ARTICLE I. INTRODUCTORY—TRIBUNALS HAVING JURISDICTION.

II. CHARACTER OF THE ACTION—PLEADINGS AND PRACTICE—FUNCTIONS OF THE LAND DEPARTMENT PENDING THE ACTION.

III. THE JUDGMENT AND ITS EFFECT.

## ARTICLE I. INTRODUCTORY—TRIBUNALS HAVING JURISDICTION.

§ 746. Introductory—What courts are courts of competent jurisdiction.

§ 747. The federal courts.

§ 748. The state courts.

**§ 746. Introductory — What courts are courts of competent jurisdiction.**—Section twenty-three hundred and twenty-six of the Revised Statutes provides as follows:—

> It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim. . . . .

This was supplemented by the act of congress of March 3, 1881,[1] which provided that,—

> If, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered accord-

[1] 21 Stats. at Large, 505; Comp. Stats. 1901, p. 1431; 5 Fed. Stats. Ann. 36.

ing to the verdict. In such case, costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

We have already observed that upon the filing of the adverse claim the powers of the land department, except for certain limited purposes, are suspended until such time as the merits of the claim are litigated and determined in the courts, or the adverse claim is waived.[2]

Congress could have conferred this jurisdiction to determine conflicting claims to mining locations on the officials of the land offices, just as such jurisdiction is given them in the matter of contests and protests arising under the agricultural laws, but recognizing the intricate nature of some of the problems involved it confided the determination of such rights to the courts and juries of the vicinity.[3]

The law does not specifically designate the particular court whose jurisdiction is to be invoked. It simply requires that the adverse claimant commence proceedings within a specified period in a court of *competent* jurisdiction.

It is not difficult to arrive at the manifest intention of congress in enacting these laws. In the early period of mining in the west the possessory title to mineral lands of the public domain was governed by the local rules and customs of the vicinage, which, while possessing the same general characteristics, varied in some respects in different localities. In later periods permissive state legislation superseded, to a great degree, the primitive system, the local regu-

[2] *Ante*, § 742.

[3] Upton v. Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275, 278.

lation, however, still performing some function. These two elements, although somewhat incongruous, when not in conflict with the federal law, became a part of it to such an extent that the congressional law could not be fully administered without giving them due consideration. The local courts of general jurisdiction first recognized the local customs, determined their force and validity, and their decisions ripened into rules of property,[4] which the government, as the paramount proprietor, acquiesced in, first, by passive noninterference, and then by judicial and legislative recognition.[5]

When congress passed the lode law of 1866, which was but a crystallization of the local rules, it embodied in it a provision of the same general import, with reference to adverse claims, as that now embodied in section twenty-three hundred and twenty-six of the Revised Statutes. Under the act of 1866 adverse claims were to be adjudicated by courts of *competent* jurisdiction.[6]

In giving legislative recognition and sanction to this system of local regulation, congress undoubtedly intended that the tribunals which had, since the discovery of gold in California, determined the conflicting rights of miners upon the public mineral lands by reference to these local rules, should continue to perform that office. In other words, it was practically a part of the system which the government recognized.[7]

The government, in effect, said to the miners:—

> "We recognize your right to explore the public mineral lands, and in acquiring possessory rights we

[4] *Ante*, § 44.

[5] *Ante*, §§ 45, 56.

[6] Act of July 26, 1866, § 6. See Appendix.

[7] The supreme court of New Mexico has adopted this suggestion. Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 279.

permit you to be governed by such rules as you may voluntarily adopt, provided they are not in conflict with the congressional law, and are recognized and enforced by the decisions of your local courts. If controversies arise, settle them in these courts, and when an adjudication is had before them, we will recognize it as establishing the right of the successful party to purchase the land."

No critical inspection of the law from a constitutional standpoint was thought of.

In recent years, however, some questions have arisen to perplex the courts. Questions of pleading and practice, the exact relationship between the courts and the land department in administering the mining laws, as well as questions of jurisdiction, which, while lost sight of or practically ignored in the early periods, ultimately forced themselves upon the attention of the courts.

The primary object to be accomplished through the medium of the adverse suit is the determination of the right of possession to a given tract of public mineral land,[8] the fee of which resides in the general government. The ultimate purpose of the action is to determine which of the contending parties, if either of them, is entitled to a United States patent, the judgment entered in the adverse suit being accepted by the land department as a final determination of the "right of possession."[9] As the estate in an unpatented mining claim is treated and dealt with for all practical pur-

[8] Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1050, 22 Morr. Min. Rep. 610; S. C., in error, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278.

[9] Butte Land & Inv. Co. v. Merriman, 32 Mont. 402, 108 Am. St. Rep. 590, 80 Pac. 675, 678; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278; Tonopah Fraction M. Co. v. Douglass, 123 Fed. 936, 941. See, also, par. 55, Mining Regulations, Appendix.

poses as an estate in fee,[10] ordinarily any court which may take jurisdiction of the trial of actions involving title to land would be a court of "competent jurisdiction" for the purpose of determining adverse claims to a mining location. Congress, having failed to designate the particular court or courts which would have jurisdiction, left the matter to be determined by the ordinary rules in respect to the jurisdiction of the state and federal courts.[11]

For example: If the requisite diversity of citizenship of the parties and the jurisdictional value exists, the federal courts would be competent to determine the issues. If the parties were all residents of the same state, and no "federal question" was necessarily involved, the state court empowered under the state constitution and laws to try actions relating to real property would be the proper, and in fact the only tribunal in which to institute and prosecute the adverse suit.

It was at one time urged that the federal courts should take jurisdiction in all adverse cases where it was invoked, regardless of the citizenship of the parties (the jurisdictional value being present) for the following reasons:—

(1) The adverse suit is one step in the administration of the laws of the United States in respect to mineral lands, and therefore it must be presumed that congress intended that such step should rightfully be taken in one of the courts of the United States;

(2) The action arises out of an act of congress, is required to be brought within a specified time, and a penalty is imposed for a failure to so bring it;

10 *Ante*, § 539.

11 Shoshone M. Co. v. Rutter, 177 U. S. 505, 506, 20 Sup. Ct. Rep. 726, 44 L. ed. 864.

(3) Congress has no power to confer jurisdiction upon state courts, and to compel the state courts to entertain such jurisdiction. They derive their authority from the organic and statutory law of the state, and their procedure, form of judgment and its operative force are referable solely to state laws. They cannot be charged by congress with auxiliary functions in aid of the administration of the public land system.[12]

In other words, it was contended that the federal and state courts were, with reference to the forum in which this class of cases is to be litigated, courts of concurrent jurisdiction; the adverse claimant may seek either tribunal; if he select a state court, the patent applicant may remove to the federal court, or may waive his right of removal and proceed to trial in the state court; if the latter course is adopted, he will be barred from suing out a writ of error from the supreme court of the United States to the highest court of the state unless a federal question—i. e., a question of controverted federal statutory construction—appears upon the face of the record and is urged at the trial.

For many years this contention received the sanction and approval of the federal courts in the mining regions, which courts took jurisdiction of adverse cases regardless of the diversity of citizenship or "federal question."[13]

[12] Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028, 1029; Hopkins v. Butte Copper Co., 29 Mont. 390, 74 Pac. 1081, 1082; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658, 659.

[13] Frank G. & S. M. Co. v. Larimer, 8 Fed. 724, 1 Morr. Min. Rep. 150; Burke v. Bunker Hill & Sullivan M. Co., 46 Fed. 644, 646; Strasburger v. Beecher, 44 Fed. 209, 213; Wise v. Nixon, 76 Fed. 3, 4; Rutter v. Shoshone M. Co., 75 Fed. 37; Shoshone M. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223, 19 Morr. Min. Rep. 356; McFadden v. Mountain View

But the supreme court of the United States has overruled this contention, and it is now well settled that section twenty-three hundred and twenty-six of the Revised Statutes, providing for the determination of adverse claims to mining locations arising out of the patent proceedings "by a court of competent jurisdiction," does not relate to any particular court, state or federal, but it was the intention of congress in this legislation to leave open to suitors all courts competent to determine the question of the right of possession.[14]

A suit brought in support of an adverse claim is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a federal court regardless of the citizenship of the parties. Although suits of this character *may* sometimes so present questions arising under the constitution or laws of the United States that a federal court will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the statutes of congress is not of itself sufficient to vest jurisdiction in the federal courts.[15]

Although such actions are necessarily brought under the authority of a federal statute the questions involved may be only of general or local law.[16]

M. Co., 97 Fed. 670, 38 C. C. A. 354; Linksweiler v. Schneider, 95 Fed. 203, 204; California Oil & Gas Co. v. Miller, 96 Fed. 12, 16; Nevada Sierra Oil Co. v. Miller, 97 Fed. 681, 682.

[14] Blackburn v. Portland G. M. Co., 175 U. S. 571, 576, 20 Sup. Ct. Rep. 222, 44 L. ed. 276.

[15] Shoshone M. Co. v. Rutter, 177 U. S. 505, 507, 20 Sup. Ct. Rep. 726, 44 L. ed. 864; De Lamar's Nevada G. M. Co. v. Nesbitt, 177 U. S. 523, 527, 20 Sup. Ct. Rep. 715, 44 L. ed. 872; Beals v. Cone, 188 U. S. 184, 186, 23 Sup. Ct. Rep. 275, 47 L. ed. 435; Willett v. Baker, 133 Fed. 937, 943; McMillen v. Ferrum Min. Co., 197 U. S. 343, 25 Sup. Ct. Rep. 533, 49 L. ed. 784. See, also, Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. Rep. 704, 56 L. ed. 1205.

[16] Beals v. Cone, *supra;* McMillen v. Ferrum M. Co., 197 U. S. 343, 347, 25 Sup. Ct. Rep. 533, 49 L. ed. 784.

This class of actions, therefore, is to be dealt with in the same manner as other actions involving the title or right of possession to real property generally. The forum to be invoked will depend upon the general principles of law defining the jurisdiction of the federal courts, and the respective state courts. It is not incumbent upon us to critically define these principles. A brief reference to them will perhaps be justified.

**§ 747. The federal courts.**—As the jurisdiction of the federal courts in suits brought to determine adverse claims to mining locations arising out of the patent proceedings is said to be confined to cases where either (*a*) there is a diversity of citizenship, or (*b*) where there is involved a controverted construction of the federal statutes, we must necessarily resort to treatises on the organization and jurisdiction of the federal courts and there seek the rules prescribing the conditions precedent to the maintenance of the action in such courts,—that is, what constitutes diversity of citizenship and under what circumstances may a federal question be said to exist. The first of these questions presents no serious difficulty. The second is extremely intricate and difficult. The supreme court of the United States in the exercise of an extreme judicial caution has expressed the view that suits of this character *may* sometimes so present questions arising under the constitution or laws of the United States that the federal courts will have jurisdiction.[17] But no case of this kind has ever been brought to our attention. A careful analysis of the adjudicated cases on the subject of "federal question" leads us to the

[17] Shoshone M. Co. v. Rutter, 177 U. S. 505, 20 Sup. Ct. Rep. 726, 44 L. ed. 864; Blackburn v. Portland G. M. Co., 175 U. S. 571, 579, 20 Sup. Ct. Rep. 222, 44 L. ed. 276.

conclusion that it is practically impossible to frame a complaint at law or a bill in equity in a federal court in an action arising out of an adverse claim which will give that court jurisdiction, all the parties being residents of the same state.

The questions to be determined in such cases are largely, if not exclusively, questions of fact. There is no controverted question of statutory construction. If there might be, it would not, and could not, appear upon the face of the bill, and it must so appear, or the court is without jurisdiction.[18]

In framing the complaint or bill, the complainant is not permitted to anticipate the defense and prophetically plead what he understands his adversary will contend.[19] Nor will apt allegations in an answer

[18] Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461, 14 Sup. Ct. Rep. 654, 38 L. ed. 511; Chappell v. Waterworth, 155 U. S. 102, 107, 15 Sup. Ct. Rep. 34, 39 L. ed. 85; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 487, 15 Sup. Ct. Rep. 192, 39 L. ed. 231; East Lake Land Co. v. Brown, 155 U. S. 488, 15 Sup. Ct. Rep. 357, 39 L. ed. 233; Texas Pac. Ry. v. Cody, 166 U. S. 606, 609, 17 Sup. Ct. Rep. 703, 41 L. ed. 1132; Walker v. Collins, 167 U. S. 57, 59, 17 Sup. Ct. Rep. 738, 42 L. ed. 76; People's U. S. Bank v. Goodwin, 160 Fed. 727, 728 (this case contains an elaborate discussion and citation of authorities); Boston & Montana etc. Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 639, 23 Sup. Ct. Rep. 440, 47 L. ed. 626; Spencer v. Duplan Silk Co., 191 U. S. 526, 24 Sup. Ct. Rep. 174, 48 L. ed. 287; Bankers' Casualty Co. v. Minn. St. Ry., 192 U. S. 371, 383, 24 Sup. Ct. Rep. 325, 48 L. ed. 484; Filhiol v. Torney, 194 U. S. 356, 366, 24 Sup. Ct. Rep. 698, 48 L. ed. 1014.

[19] Florida Central & Peninsular R. R. Co. v. Bell, 176 U. S. 321, 327, 20 Sup. Ct. Rep. 399, 44 L. ed. 486; Arkansas v. Kansas etc. R. R., 183 U. S. 185, 188, 22 Sup. Ct. Rep. 47, 46 L. ed. 144; Boston & Montana etc. Co. v. Montana Ore etc. Co., 188 U. S. 632, 639, 23 Sup. Ct. Rep. 440, 47 L. ed. 626, which says: "To allege such a defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading—and is improper." Banker's Casualty Co. v. Minn. St. etc. Ry. Co., 192 U. S. 371, 385, 24 Sup. Ct. Rep. 325, 48 L. ed. 484; Devine v. Los Angeles, 202 U. S. 313, 333, 26 Sup. Ct. Rep. 652, 50 L. ed. 1046; Louisville etc. R. Co. v. Mottley, 211 U. S. 148, 29 Sup. Ct. Rep. 42,

pleading circumstances and conditions from which such a controverted construction of the federal statute might appear, give the court jurisdiction.[20]

Such being the case, considering the obvious environment of every adverse suit, which is necessarily limited to conflicting surface areas,[21] how is it possible to state such a "federal question" as would confer jurisdiction on the federal courts? The suggestion that it *may* sometimes be possible to so state such a question is, in our experience, an *ignis fatuus*. We are quite safe in saying that the federal courts will only have jurisdiction in adverse cases where there exists diversity of citizenship coupled with jurisdictional value. In all other cases, suitors are compelled to invoke the aid of the state courts. If during the trial a federal question arises, and is properly and opportunely[22] asserted, a writ of error may ultimately be available in the supreme court of the United States, but we can hardly conceive such a case, unless it involves something more than the mere construction of the mining laws of the United States—e. g., a state statute compelling performance of conditions connected with the location of mining claims which is repugnant to the federal laws. We will deal with the subject of pleadings in the federal courts in a subsequent section.

53 L. ed. 126, citing all previous cases; Joy v. City of St. Louis, 122 Fed. 524, 525; S. C., in error, 201 U. S. 332, 26 Sup. Ct. Rep. 478, 50 L. ed. 776.

[20] Id.

[21] *Ante*, § 730.

[22] McMillen v. Ferrum M. Co., 197 U. S. 343, 347, 25 Sup. Ct. Rep. 533, 49 L. ed. 784, citing Mallett v. North Carolina, 181 U. S. 589, 591, 21 Sup. Ct. Rep. 730, 45 L. ed. 1015; Loeber v. Schroeder, 149 U. S. 580, 585, 13 Sup. Ct. Rep. 934, 37 L. ed. 856; Miller v. Texas, 153 U. S. 535, 539, 14 Sup. Ct. Rep. 874, 38 L. ed. 812.

**§ 748. The state courts.**—Ever since the first mining law of congress was passed, the state courts have been hearing and determining adverse cases, and assisting the land department in the administration of the mining laws. There never has been any question but what the ordinary state tribunals had jurisdiction to try actions involving the right of possession to mining claims, but whence this jurisdiction arises in cases connected with the patent proceedings has been the subject of discussion in controversies involving the nature of the pleading required and the character of the action.

It may be accepted as the established doctrine that the act of congress under consideration does not confer any additional jurisdiction upon the state courts.[23] The action to determine an adverse claim to unpatented mining claims is an action concerning real property. Such a mining claim is real estate,[24] and the jurisdiction to try controversies arising out of conflicting claims to real estate is vested in the state courts by virtue of the state constitution.[25]

The views of the several state courts as to the character of the action, and the nature of the pleadings in support of it will be discussed in subsequent sections.[26]

23 Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 279.

24 *Ante*, § 539.

25 420 M. & M. Co. v. Bullion M. Co., 9 Nev. 240–248, 1 Morr. Min. Rep. 114; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312, 321, 1 Morr. Min. Rep. 120; Iba v. Central Assn., 5 Wyo. 355, 42 Pac. 20, 21; Altoona Q. M. Co. v. Integral etc. M. Co., 114 Cal. 100, 45 Pac. 1047, 1048, 18 Morr. Min. Rep. 410; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 1041, 16 Morr. Min. Rep. 68; Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028, 1029; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658, 659.

26 *Post*, §§ 754, 755.

## Article II. Character of the Action—Pleadings and Practice—Functions of the Land Department Pending the Action.

§ 754. Character of the action—At law or in equity—Pleadings.
§ 755. General rules of pleading.
§ 756. Time within which action must be commenced.
§ 757. Action when deemed commenced.
§ 758. Parties to the action.
§ 759. Functions of the land department, pending the action.

**§ 754. Character of the action—At law or in equity—Pleadings.**—The supreme court of the United States characterizes the action as one brought under a special statute of the United States in support of an adverse claim.[27]

The proceedings in the case are commenced in the land office by the assertion of the defendant's claim to have a patent issued to him for the land in controversy. The next step is the filing of an adverse claim by the plaintiff in that office, and the suit is but a continuation of these proceedings.[28]

The proceedings are said to be purely statutory, and have their inception not in the court in which the suits were commenced, but in the land office.[29]

The object of the action is not, strictly speaking, to determine the title to real estate, because the fee resides in the government. The true question for discussion is which of the contending parties has complied

[27] Bennett v. Harkrader, 158 U. S. 441, 447, 15 Sup. Ct. Rep. 683, 39 L. ed. 1046, 18 Morr. Min. Rep. 224; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. Rep. 971, 41 L. ed. 113.

[28] Wolverton v. Nichols, 119 U. S. 485, 488, 7 Sup. Ct. Rep. 289, 30 L. ed. 474, 15 Morr. Min. Rep. 309.

[29] Doe v. Waterloo M. Co., 43 Fed. 219, 221; California Oil & Gas Co. v. Miller, 96 Fed. 13, 17; Tonopah Fraction M. Co. v. Douglass, 123 Fed. 936, 938.

with the requirements of the law and is prior in time.[30] In other words, in whom is the present right of possession?[31]

It is not sufficient that one party should establish a better title than the other, but the prevailing party must show clearly a valid right of possession based on a compliance with the mining statutes.[32]

In suits of this character the United States has been said to be a *quasi* party, and if neither plaintiff nor defendant is entitled to a patent, the court must so find.[33] The supreme courts of California and Montana have held that the issue is not "who is entitled to a patent," but "who has the right of possession."[34] In view of the authority and duty of the land department to determine for itself the question as to whether either party is entitled to a patent,[35] and since the question as to whether or not a patent shall issue depends upon many factors other than that of possession,[36] it is clear that any finding by the court that either party is entitled to a patent would not be treated

[30] Funk v. Sterrett, 59 Cal. 613, 615; Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 22 Morr. Min. Rep. 47.

[31] Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1050, 22 Morr. Min. Rep. 610; Duffield v. San Francisco Chemical Co., 198 Fed. 942; Butte L. & I. Co. v. Merriman, 32 Mont. 402, 108 Am. St. Rep. 590, 80 Pac. 675, 678.

[32] Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. 904, 906, 15 Morr. Min. Rep. 324; Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; Lee Doon v. Tesh, 68 Cal. 43, 6 Pac. 97, 98, 8 Pac. 621, 625; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 660, 15 Morr. Min. Rep. 329; Allyn v. Schultz, 5 Ariz. 152, 48 Pac. 960, 962.

[33] Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, and note q. v.

[34] Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028, 1029; Butte L. & I. Co. v. Merriman, 32 Mont. 402, 108 Am. St. Rep. 590, 80 Pac. 675, 678.

[35] See *ante*, § 664.

[36] See § 2326, Rev. Stats., and Butte L. & I. Co. v. Merriman, 32 Mont. 402, 108 Am. St. Rep. 590, 80 Pac. 675, 678.

by the land department as binding except as to the right of possession, and any value it might have otherwise would be only advisory.[37] The land department must in every case determine the force and effect of the award of the right of possession by the court.[38]

If both fail to establish such right of possession in court, neither can recover; so that each must rely upon the strength of his own title, and not on the weakness of his adversary.[39] Each party is practically a plaintiff and must show title.[40]

As to whether the action is to be characterized as one at law or one in equity, or a special statutory proceeding, will depend on the circumstances and on the law of the forum whose jurisdiction is invoked.[41]

The form of the action and the mode of procedure in the state courts are regulated by the same rules and controlled by the same statutes that apply to ordinary actions.[42]

Any action which is appropriate in form according to the law of the particular state or territory may be employed.[43]

[37] Clipper M. Co. v. Eli M. & L. Co., 34 L. D. 401.

[38] Id.

[39] Murray Hill M. & M. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762, 764; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39; Willitt v. Baker, 133 Fed. 937, 947.

[40] Brown v. Gurney, 201 U. S. 184, 190, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

[41] Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 967; Kirby v. Higgins, 33 Mont. 518, 85 Pac. 275, 277.

[42] Murray v. Polglase, 23 Mont. 401, 59 Pac. 439, 441; Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028, 1029; Bernard v. Parmalee, 6 Cal. App. 537, 92 Pac. 658, 660.

[43] Deeney v. Mineral Creek M. Co., 11 N. M. 279, 22 Morr. Min. Rep. 47, 67 Pac. 724; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 967; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278.

In many of the states actions in the nature of suits to quiet title may be maintained equally by those out of possession as well as by those in possession. Where this class of actions is brought under such a statute by a party out of possession, it is practically a substitute for an action of ejectment, and is to be treated as an action at law, and either party may demand a jury trial.[44]

In Arizona it has been held that the adverse action is purely a statutory remedy, and not a "common-law" action. Therefore, the parties are not entitled to a jury.[45]

If the plaintiff is in possession, and institutes the suit in the form of an action to quiet title, it is essentially an action in equity, and parties are not entitled to a jury.[46]

In the federal courts if the defendant is in possession equity will not take cognizance of the action, for ejectment affords a plain, adequate and complete remedy at law. And unless it is alleged either that plaintiff is in possession, or that neither party has possession, the bill is demurrable on that ground.[47]

[44] Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096; Newman v. Duane, 89 Cal. 597, 27 Pac. 66; Landregan v. Peppin, 94 Cal. 465, 21 Pac. 774; Montana Ore Purchasing Co. v. Boston & M. Cons. C. & S. M. Co., 27 Mont. 536, 71 Pac. 1005, 1006; Hickey v. Anaconda Copper Co., 33 Mont. 46, 81 Pac. 806, 808; Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517, 518.

[45] Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 642, 19 Morr. Min. Rep. 625.

[46] Angus v. Craven, 132 Cal. 691, 64 Pac. 1091, 1094; Montana Ore Purchasing Co. v. Boston & M. Cons. C. & S. M. Co., 27 Mont. 536, 71 Pac. 1005, 1006. The opinion in this case contains an elaborate discussion of the right of trial by jury where actions are brought under state statutes to quiet title by parties in possession. See, also, Shields v. Johnson, 10 Idaho, 476, 3 Ann. Cas. 245, 79 Pac. 391, 393.

[47] Southern Pac. R. R. Co. v. Goodrich, 57 Fed. 879, 881; Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. Rep. 1129, 30 L. ed. 1010; White-

The fact that state statutes allow actions to quiet title regardless of who is in possession is of no avail in the federal courts.[48]

As was said by the supreme court of the United States:—

> The determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office; but the form of the action is not provided for by the statute, and apparently an action at law or a suit in equity will lie, as either might appropriately be under the particular circumstances, an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession.[49]

The same tribunal has also said:—

> The suit is brought for special relief, and the judgment entered is such as a court exercising jurisdiction in equity alone could render.[50]

head v. Shattuck, 138 U. S. 146, 11 Sup. Ct. Rep. 276, 34 L. ed. 873; Davidson v. Calkins, 92 Fed. 230, 232; Morrison v. Marker, 93 Fed. 692, 695; California Oil & Gas Co. v. Miller, 96 Fed. 12, 25; Willitt v. Baker, 133 Fed. 937, 943; Boston & Montana etc. Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 640, 23 Sup. Ct. Rep. 440, 47 L. ed. 626; Stuart v. Union Pac. R. R., 178 Fed. 753, 103 C. C. A. 89; citing Whitehead v. Shattuck, 138 U. S. 146, 150, 156, 11 Sup. Ct. Rep. 276, 34 L. ed. 873; U. S. Mining Co. v. Lawson, 134 Fed. 769, 772; Lawson v. U. S. Min. Co., 207 U. S. 1, 28 Sup. Ct. Rep. 15, 52 L. ed. 65.

[48] Id.

[49] Perego v. Dodge, 163 U. S. 160, 165, 16 Sup. Ct. Rep. 971, 41 L. ed. 113; Tonopah Fraction M. Co. v. Douglass, 123 Fed. 936, 938.

[50] Hammer v. Garfield M. & M. Co., 130 U. S. 291, 296, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Rutter v. Shoshone M. Co., 75 Fed. 37, 38; S. C., on appeal, 87 Fed. 801, 31 C. C. A. 223, 19 Morr. Min. Rep. 356; Doe v. Waterloo M. Co., 43 Fed. 219, 221. While conceding the action in the federal courts to be of an equitable nature, Judge Hawley says that it does not necessarily follow that the strict rule of equity pleading should be applied with an iron hand to all such cases, or that complainant be compelled to set forth with clockwork precision every step in his acquisition of the right to possession or of pointing out the defects in his adversary's title. Tonopah Fraction M. Co. v. Douglass, 123 Fed. 936, 939.

Yet a bill on the equity side of the United States district court to quiet the title which showed that the plaintiff was out of possession would upon its face disclose that the court had no jurisdiction,[51] unless the bill also showed that neither party was in possession.[52]

If in possession, the claimant of an adverse claim in the patent proceeding may proceed on the chancery side of the court.[53]

The term "proceedings," which are required by section twenty-three hundred and twenty-six of the Revised Statutes to be commenced within thirty days, was no doubt used to enable a party to institute such proceedings under the different forms of action allowed by the state and federal courts.[54]

The attitude of the several states and territories upon the character of the action may be gleaned from a review of their decisions upon questions of pleadings and practice, illustrating the difference between rules applied to ordinary actions and those which are confessedly brought under the provisions of section twenty-three hundred and twenty-six. To ascertain the views of each state, or such of them as have dealt with the questions of the relationship of the state courts as tribunals auxiliary to the land department in the patent proceedings, we may epitomize the decisions, dealing with each state separately.

51 Davidson v. Calkins, 92 Fed. 230, 232; Johnson v. Munday, 104 Fed. 594, 44 C. C. A. 64, 21 Morr. Min. Rep. 96; Durgan v. Redding, 103 Fed. 914, 916; McGuire v. Pensacola City Co., 105 Fed. 677, 679, 44 C. C. A. 670, and cases cited; New Jersey Land & L. Co. v. Gardener Lacy Land Co., 190 Fed. 861, 866.

52 Willitt v. Baker, 133 Fed. 937, 942; Boston etc. Co. v. Montana Ore P. Co., 188 U. S. 632, 641, 23 Sup. Ct. Rep. 440, 47 L. ed. 626.

53 Gillis v. Downey, 85 Fed. 483, 488, 29 C. C. A. 286.

54 420 M. & M. Co. v. Bullion M. Co., 3 Saw. 634, Fed. Cas. No. 4989, 11 Morr. Min. Rep. 608; Chambers v. Harrington, 111 U. S. 350, 351, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; Mattingly v. Lewisohn, 8 Mont. 259,

*Arizona.*—

In ordinary actions general allegations are sufficient.[55] In actions upon adverse claims all facts should be alleged.[56]

The action is in the nature of a suit to quiet title under paragraph thirty-one hundred and thirty-two of the Revised Statutes of Arizona, as amended March 17, 1891.[57]

The remedy is purely statutory, and parties are not entitled to a jury.[58]

Section twenty-three hundred and twenty-six of the Revised Statutes[58a] creates a statutory exception to the exclusive jurisdiction of the land office.

The allegation in the complaint of the filing of an adverse claim in the land office is jurisdictional, and without such allegation, when the complaint alleges the pendency of patent proceedings instituted by the defendant, the complaint is demurrable.[59]

*California.*—

In ordinary actions concerning real estate, a general allegation of ownership is all that is required.[60]

19 Pac. 310, 311; Cronin v. Bear Creek M. Co., 3 Idaho, 614, 32 Pac. 204; Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312, 1 Morr. Min. Rep. 120; Mars v. Oro Fino M. Co., 7 S. D. 605, 65 N. W. 19, 22.

55 Veronda v. Dowdy, 13 Ariz. 265, 108 Pac. 482.

56 Allyn v. Schultz, 5 Ariz. 152, 48 Pac. 960, 962; Keppler v. Becker, 9 Ariz. 234, 80 Pac. 334; Clason v. Matkos, 12 Ariz. 213, 100 Pac. 773, 774; Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 240.

57 Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197, 198; Jordan v. Schuerman, 6 Ariz. 79, 53 Pac. 579.

58 Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 643, 19 Morr. Min. Rep. 625.

58a 17 Stats. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35.

59 Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 239.

60 Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Rough v. Simmons, 65 Cal. 227, 3 Pac. 804, 15 Morr. Min. Rep. 298; Castro v. Barry, 79 Cal. 443, 21 Pac. 946.

Mining claims are real estate, and the rule applies to actions concerning them.[61]

Under the general issue defendant may introduce any evidence which may tend to defeat plaintiff's claim.[62]

In an action for trespass upon a mining claim, the plaintiff need not allege citizenship;[63] nor is it required in an action to erect a trust as to such a claim,[64] nor in an action to quiet title,[65] nor in an action of ejectment.[66]

But in actions which appear upon the face of the pleadings to be prosecuted for the purpose of determining the adverse claim under section twenty-three hundred and twenty-six of the Revised Statutes, it has been held that the qualification of the applicant to receive the patent—i. e., his citizenship—must be averred,[67] and where a third party sought to intervene in an action brought under the terms of sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six of the United States Revised Statutes, the court held that since the complaint in intervention did not allege that the intervener had filed an application for patent nor any opposition to

61 Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; Contreas v. Merck, 131 Cal. 211, 63 Pac. 336.

62 Holmes v. Salamanca G. M. & M. Co., 5 Cal. App. 659, 91 Pac. 160, 162.

63 Lee Doon v. Tesh, 68 Cal. 44, 6 Pac. 97, 98, 8 Pac. 621; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182, 185; Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488, 490; Contreras v. Merck, 131 Cal. 211, 63 Pac. 336, 337.

64 Moritz v. Lavelle, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, 805, 16 Morr. Min. Rep. 236.

65 Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028, 1029.

66 Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540, 541.

67 Lee Doon v. Tesh, 68 Cal. 43, 6 Pac. 97, 98, 8 Pac. 621.

the application for patent filed by the defendant, it did not state facts sufficient to entitle the parties to intervene.[68]

In the case of Anthony v. Jillson,[69] the supreme court held that in this class of actions each of the parties litigant must state in his pleadings all the facts upon which he relies as showing his right to become a purchaser, and the steps he has taken to avail himself of and secure his right to the patent.

In the later case of Altoona Q. M. Co. v. Integral Q. M. Co.,[70] an action was brought to determine an adverse claim, the pleading setting forth the filing of a patent application by defendant in the local land office and the proceedings had thereon and the filing of an adverse claim therein by the plaintiff. The suit was manifestly instituted in support of the adverse claim, asserted in the land office, but the appellate court styles the action as one to quiet title, specifically announcing that it was not an action brought under section twenty-three hundred and twenty-six of the Revised Statutes. We apprehend that the court intended to convey the idea that as the state courts had no concern with the proceedings in the land office, the allegations concerning them were mere surplusage, irrelevant and redundant matter, and that it was compelled to consider the action as an ordinary one to quiet title, to be tried and decided by the ordinary rules governing this class of cases. The court ruled that citizenship need not be averred. As to the form

[68] Mont Blanc Cons. G. M. Co. v. Debour, 61 Cal. 364, 15 Morr. Min. Rep. 286; cited in Lily M. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 519.

[69] 83 Cal. 296, 23 Pac. 419, 16 Morr. Min. Rep. 26.

[70] 114 Cal. 100, 45 Pac. 1047, 18 Morr. Min. Rep. 410. Cited and followed in Bernard v. Parmelee, 6 Cal. App. 537, 541, 92 Pac. 658, 660. See, also, Schroder v. Aden G. M. Co., 144 Cal. 628, 630, 78 Pac. 20, 21.

of the judgment, it was further held that the state courts were not concerned with the question as to whether the judgment could be made available in the land office or not.

If we correctly interpret this decision, it is manifest that all that is required in this state in actions instituted by an adverse claimant in support of his adverse claim filed in the land office is, to file his complaint alleging his ownership and right of possession, making no reference whatever to the antecedent proceedings in the land office. The defendant and patent applicant may answer simply by a general denial of the plaintiff's title. As to the form of judgment, the court in the Altoona case intimates that the trial judge is at liberty to order a special verdict, if that was desired by the parties, because it would be more serviceable in the contest; but this is a matter of discretion, and cannot be demanded as a right. In the more recent case of Gruwell v. Rocco,[71] the supreme court of California has said:—

> The proceedings in the land department, the citizenship of the parties and other matters may be heard by the trial court for the purpose of determining who is entitled to possession, but they are only matters of evidence to aid the court in arriving at the ultimate fact. . . . . The state court does not concern itself with the question as to whether or not its judgment can be used in the land office.[72]

71 141 Cal. 147, 74 Pac. 1028, 1029.

72 Id. The case of Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 1042, 18 Morr. Min. Rep. 68, is cited to support this latter proposition. With all deference to the views of the learned court the case cited does not sustain the proposition announced to the effect that the state court will not concern itself with the question as to whether its judgment can be used in the land office. The Quigley case does say that: "The court had nothing to do with the proceedings in the land office, and no power to determine as to their regularity or irregularity, sufficiency or insuffi-

With due respect for the expressions of opinion in the Altoona and other California cases following that doctrine, it would seem that a spirit of comity, as well as the desire for a statement of facts in the pleadings which would at once earmark these actions as being proceedings brought in contemplation of section twenty-three hundred and twenty-six of the Revised Statutes, would induce the courts to recognize the fact that such a statute does exist, that numerous suits are brought in pursuance of its provisions, and that if the land department is not properly advised of the outcome of the litigation by appropriate judgments, that this will lessen the respect of the department for those judgments, and the rights of litigants may suffer accordingly. Under the peculiar circumstances of the situation, a broad and liberal attitude toward the federal requirements should be taken. The uniform practice for years in this state, however, has been to set forth in the pleadings the pendency of the patent proceedings.

The doctrine of the Altoona case has been criticised by the supreme courts of Arizona,[73] Montana,[74] and New Mexico,[75] and the rule as announced by the courts of practically all of the other western states which have had occasion to pass on the question is opposed to that doctrine.

ciency," but the rule announced in the Gruwell case does not follow from this statement in the Quigley case, which is clearly correct as far as it goes. It is to be noted that the allegations in the Quigley case did state the facts relative to the filing of the adverse claim in the land office. See, also, Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 240, and Upton v. Santa Rita Mining Co., 14 N. M. 96, 89 Pac. 275, 279, commenting on the Gruwell-Rocca case.

[73] Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 240.

[74] Thornton v. Kaufman, 35 Mont. 181, 88 Pac. 796.

[75] Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 379.

*Colorado.*—

In ordinary actions the general averment of ownership is sufficient,[76] and the defendant may prove title by valid prior location under a general denial of plaintiff's ownership.[77]

Actions of the character required by section twenty-three hundred and twenty-six of the Revised Statutes are purely statutory,[78] and the proceedings must be conducted in accordance with the statute which authorizes them.[79]

As the proceedings in the land office form the basis of the action, they should be alleged.[80]

The adverse suit is a continuation of the land office proceedings.[81]

The decisions of the courts in this state fully recognize that the action, while being essentially an action to quiet title, is based upon the laws of congress. The proceedings in the land office are set forth in the pleadings, showing the filing of the patent application, the commencement of the period of publication, and the filing of the adverse claim within that period. The

[76] McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076, 1077; Jackson v. Dines, 13 Colo. 90, 21 Pac. 918, 919; Keeler v. Trueman, 15 Colo. 143, 25 Pac. 311.

[77] See Adams v. Crawford, 116 Cal. 495, 48 Pac. 488, 490.

[78] Keeler v. Trueman, 15 Colo. 143, 25 Pac. 311.

[79] McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 660, 15 Morr. Min. Rep. 329; Manning v. Strehlow, 11 Colo. 451, 18 Pac. 625, 627. Colorado has a statute on the subject of costs in an adverse suit. Colo. Rev. Stats., § 1061.

[80] Marshall etc. M. Co. v. Kirtley, 12 Colo. 410, 416, 21 Pac. 492, 494. The allegation that the land office has received and filed the adverse claim carried with it the presumption that it had been filed within the legal time. Pennsylvania M. Co. v. Bales, 18 Colo. App. 108, 70 Pac. 444, 22 Morr. Min. Rep. 436. See, also, Hain v. Mattes, 34 Colo. 345, 83 Pac. 127, 128; Rawlings v. Casey, 19 Colo. App. 152, 73 Pac. 1090, 1091.

[81] Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015, 1016.

qualification of contending parties to receive a patent must also be shown.[82]

The prime purpose of such a suit is to determine, for the information of the land department, which, if either of the parties thereto, is entitled to be vested with the fee of the premises in dispute by purchase from the government.[83]

It seems to be generally assumed that the courts may take cognizance of the action, as one required to be brought in the state tribunals, and the practice is molded so as to fulfill the manifest objects contemplated by the federal law.[84]

*Idaho.—*

In ordinary actions citizenship is not required to be alleged,[85] but such allegation must appear in the complaint in the proceeding instituted upon the adverse claim filed in the land office.[86]

As to pleadings in actions brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, the supreme court, in Burke v. McDonald,[87] approved the rule laid down by the supreme court of California in Anthony v. Jillson,[88] and the Montana case of Mattingly v. Lewisohn.[89]

82 Michael v. Mills, 22 Colo. 439, 45 Pac. 429, 430; Jackson v. Dines, 13 Colo. 90, 21 Pac. 918, 919; Keeler v. Trueman, 15 Colo. 143, 145, 25 Pac. 311, 312. The case of Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588, 590, holds that the citizenship of the original locators, grantors of the applicant for patent, must be proven. But see discussion in § 233, *ante*.

83 Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015, 1016.

84 For a form of complaint in an adverse suit in Colorado, see Morrison's Mining Rights, 14th ed., p. 543.

85 Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659.

86 Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. 904, 905, 15 Morr. Min. Rep. 324.

87 2 Idaho, 646, 649, 33 Pac. 49, 17 Morr. Min. Rep. 325.

88 83 Cal. 296, 23 Pac. 419, 16 Morr. Min. Rep. 26.

89 8 Mont. 259, 19 Pac. 310.

*Montana.*—

It was at one time held in this state that in all actions concerning mining claims it was necessary to allege discovery, location, marking of boundaries, citizenship, and such other facts from which the court might deduce the right of plaintiff to maintain the action;[90] but recently the doctrine as to ordinary actions has been materially modified, and the rule announced that, unless the action be one in support of the adverse claim filed in the patent proceeding, general allegations of ownership are sufficient.[91]

Montana has a statute which prescribes the allegations necessary to be alleged in this class of actions,[92] but the statute does not change the previous rule of pleading.[93]

The supreme court of Montana, while recognizing that the state courts do not derive their power or jurisdiction from acts of congress but from their state laws, also recognize the fact that in this class of cases the judgment will not be effective unless the action is commenced and prosecuted in accordance with the provisions of the federal statutes.[94]

The United States is held to be a *quasi* party, and if neither plaintiff nor defendant is entitled to a patent, the court must so decide.[95]

The action upon the adverse claim is characterized as a statutory one, intended to be brought under sec-

[90] Ducie v. Ford, 8 Mont. 233, 241, 19 Pac. 414, 417.

[91] McKay v. McDougal, 19 Mont. 488, 48 Pac. 988, 989.

[92] Mont. Rev. Codes, § 6882; Hopkins v. Butte Copper Co., 29 Mont. 390, 74 Pac. 1081, 1082; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 968. See, also, Moody v. Hinds, 30 Mont. 189, 76 Pac. 1, 2.

[93] Thornton v. Kaufman, 35 Mont. 181, 88 Pac. 796.

[94] Hopkins v. Butte Copper Co., 29 Mont. 390, 74 Pac. 1081, 1082.

[95] Nelson v. Freeman, 29 Mont. 470, 68 L. R. A. 833, and note, 75 Pac. 84, 86.

tion twenty-three hundred and twenty-six of the Revised Statutes. This appears, necessarily, from the allegation concerning the filing of the patent application and its pendency in the land office; otherwise these allegations are without force or meaning.

A complaint based upon such an adverse claim would be insufficient without such allegations.

> We are confirmed in this view [said the supreme court], for the additional reason that a contrary practice to the one here laid down would or might lead to a conflict of action between the officers of the land department and the courts in suits of this character. The law makes it the duty of the agents of the land department to stay proceedings on an application for a mineral patent only when an adverse claim is filed within sixty days of the publication of notice of application for patent; and when this is not done, the agents of the department would doubtless consider it their duty to issue the patent to the applicant.[96]

As to whether the parties in this class of actions are entitled to a jury was considered in the case of Mares v. Dillon,[97] where the court held the action to be one of equitable jurisdiction.[98]

The court also raises two questions which it does not decide: 1. Does section thirteen hundred and twenty-two of the Montana Code of Civil Procedure provide for a statutory proceeding in cases of this character? 2. If so, does it intend that such proceedings shall be exclusive?[99]

[96] Mattingly v. Lewisohn, 8 Mont. 259, 19 Pac. 310, 311; doctrine approved, McKay v. McDougal, 19 Mont. 488, 48 Pac. 988, 992; Murray v. Polglase, 23 Mont. 401, 59 Pac. 439, 441; Mont. Code Civ. Proc. 1895, § 1322.

[97] 30 Mont. 117, 75 Pac. 963, 967.

[98] See, also, Kerby v. Higgins, 33 Mont. 518, 85 Pac. 275, 277; Butte Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 305, 90 Pac. 177.

[99] Mares v. Dillon, *supra*. See, also, Woody v. Hinds, 30 Mont. 189,

A suit in Montana, earmarked as an adverse suit, would be dismissed if filed after the thirty-day period had expired.[100]

*Nevada.*—

According to the decisions in Nevada, the acts of congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they can bring their action to quiet title; or if they have been ousted from the possession, they can bring their action of ejectment; and in either action "the right of possession" to such claim can be finally settled and determined. When an action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our state courts, irrespective of the acts of congress.[1]

The action is a continuance of the proceeding instituted in the land office.[2]

As to this state, it may be noted that in February, 1873, the legislature passed the following act:—

> In all actions brought to determine the right of possession to a mining claim or metalliferous vein or

76 Pac. 1, 2, which upholds certain allegations specifically set forth as being sufficient whether the action be deemed a special statutory one under section 1322, Montana Code of Civil Procedure or one to quiet title under section 1310.

100 Holman v. Central Mont. Co., 34 L. D. 568. See, also, Thornton v. Kaufman, 35 Mont. 181, 88 Pac. 796, which notes the difference in the rule followed in Colorado and Arizona but declines to follow it.

1 420 M. Co. v. Bullion M. Co., 9 Nev. 240, 248, 1 Morr. Min. Rep. 114; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312, 321, 1 Morr. Min. Rep. 120; Tonopah Fr. M. Co. v. Douglass, 123 Fed. 936, 940.

2 Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178, 179, 19 Morr. Min. Rep. 286; Tonopah Fr. M. Co. v. Douglass, 123 Fed. 936, 939.

> lode, where an application has been made to the proper officers of the government of the United States by either of the parties to such action for a patent for said mining claim, vein or lode, it shall only be necessary to confer jurisdiction on the court to try said action and render a proper judgment therein, that it appear that an application for a patent for such mining claim, vein or lode, has been made, and that the parties to said action are claiming such mining claim, vein or lode, or some part thereof, or the right of possession thereof.[3]

This statute was evidently designed to supplement the provisions of section twenty-three hundred and twenty-six of the United States Revised Statutes.[3a] It is only necessary that the complaint in an adverse suit should substantially comply with its provisions, and it would be the duty of the court upon the proofs submitted at the trial to determine which of the parties had the better right to the premises in controversy.[4]

*New Mexico.*—

An ordinary declaration in ejectment was formerly held sufficient under sections twenty-two hundred and ninety and twenty-two hundred and ninety-one of the Compiled Laws of New Mexico (1897) to present all questions involved between an applicant for patent for a mining claim and an adverse claimant. This statute provides that an action of ejectment may be brought in support of an adverse claim in all cases, whether plaintiff is in or out of possession, and provides for

[3] Nev. Comp. Laws, § 1674.

[3a] 17 Stats. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35.

[4] Tonopah Fraction M. Co. v. Douglass, 123 Fed. 936, 940. This case contains a copy of a complaint held to comply with the statute and on the equity side of the court. Case cited and followed in Tonopah & Salt Lake M. Co. v. Tonopah, 125 Fed. 389, 392.

the rendition of a special verdict by the jury to define the rights of the parties in the premises.[5]

A more recent case[6] has given this question and the authorities a careful and analytical review, and while concurring in the earlier holding of the same court, that an action in ejectment is sufficient, it went further, and held that the complaint should allege the pendency of the application for patent in the land office and that the suit is brought as the result thereof. In analyzing the character of this class of actions the court agrees with the views announced by the supreme court of California in the Altoona case,[7] that the suit is filed solely to determine the question of the right of possession and that the congressional statute does not attempt to confer any new jurisdiction on the state courts, and that as far as these courts are concerned, it would be powerless to do so. The court does not, however, find it necessary to go to the length suggested by the California decisions and hold that there is no connection whatsoever between the land office proceedings and that in the local courts, but says that while congress had the power to vest the local land officials with jurisdiction over conflicting mining rights arising in connection with the patenting of the public mineral lands, it recognized that these rights could best be determined "by courts and juries of the vicinage" which had already assumed jurisdiction of similar controversies, and that this is an "arrangement of comity," and upon the filing of the suit the land office suspends action and does not concern itself with matters of pleading and procedure which are left to the local courts to determine according to their own practice,

5 Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 22 Morr. Min. Rep. 47.

6 Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 277.

7 114 Cal. 100, 45 Pac. 1047, 1048, 18 Morr. Min. Rep. 410.

and that only one condition is imposed on the local courts by section twenty-three hundred and twenty-six of the Revised Statutes,[7a] that if the proof shows that neither party is entitled to possession, that it shall be so found, but that this is not a limitation on the jurisdiction of the court, but simply a declaration by congress that the land department will not recognize a finding not based upon the right of possession, and that if the character of the action as an adverse proceeding does not appear in the allegations, "the court will lack the information upon which to require . . . . a finding in favor of neither party, in case of a failure of a proof of title by both," for in ordinary actions the plaintiff must recover on the strength of his own title, otherwise the defendant is entitled to judgment. The court concludes that:

> . . . . While the local procedure is to be followed, the adverse suit is, in an important sense, at least, a continuance of the proceedings in the land office . . . . and that as a practical question, a compliance with what the act of congress says must be done and ascertained is necessary on the part of the local courts to insure any respect for their findings from the land department.[8]

*South Dakota.—*

In this state the inclination of the judiciary is manifestly to mold its practice to conform to the requirements of the federal law as to the commencement and prosecution of the action.[9]

In ordinary actions allegation of citizenship is not essential.[10]

[7a] 17 Stats. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35.

[8] 14 N. M. 96, 89 Pac. 275, 279.

[9] Mars M. Co. v. Oro Fino M. Co., 7 S. D. 605, 65 N. W. 19, 22.

[10] McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184, 19 Morr. Min. Rep. 615.

*Utah.*—

The supreme court of Utah has held that,—

> The evident intention of the adverse proceedings authorized by section twenty-three hundred and twenty-six of the Revised Statutes is not to determine any of the rights of the United States, or the rights of the contestants, to a patent, but in aid of and for the information of the land department, to determine as between litigants the right to the possession of the mining claim in dispute.[11]

In a later case it said:—

> It is clear from the foregoing provisions of the mining law that the action is purely statutory and that the statutes of this state regulating generally actions for the recovery of real property, or for questioning the title thereto, are inapplicable.[12]

The basis of the action is the adverse claim, and an allegation by the plaintiff that such claim was filed in the land office in due time and form is necessary to confer jurisdiction upon the court.[13]

*Washington.*—

General allegations only are necessary in ordinary actions to determine the question of the right of possession to mining claims in the state of Washington.[14]

So far as we are aware the question of pleading where adverse claims in the land office are involved has not been decided in this state.

[11] Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1050, 22 Morr. Min. Rep. 610; S. C., in error, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119.

[12] Lily Min. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 519. In this case it was sought to include in an amended pleading an area in excess of that described in the adverse claim filed in the land office.

[13] Id.

[14] Protective M. Co. v. Forest City M. Co., 51 Wash. 643, 99 Pac. 1033, 1034; National M. & M. Co. v. Piccola, 54 Wash. 617, 104 Pac. 128, 129; reversed on rehearing, but not on this ground, 57 Wash. 572, 107 Pac. 353.

*Wyoming.*—

> Enforcing the provisions of the act of congress, they are adopted for the time being by our courts with the same force, and no more, as if they were part and parcel of our own statute.[15]

General allegations that petitioner is in the actual possession of the described premises and that defendant claims an estate or interest therein adverse to him are sufficient.[16]

**§ 755. General rules of pleading.**—While it may not be possible for us to formulate a rule of pleading in actions of the character under consideration which will be acceptable to all the courts of all the states, we may, we think, approximate it. In making the attempt, "we must keep the main purpose of the action in view."[17]

While the doctrine of the supreme court of California announced in the case of Altoona Q. M. Co. v. Integral Q. M. Co.,[18] heretofore referred to, may be technically correct, the state courts have unquestioned jurisdiction to determine the principal issues which are necessarily framed in such an action. While congress may not dictate to the state courts upon questions of pleading and practice, or insist that their judgment shall be in one form or another, these courts having jurisdiction ought, by such judgments, to afford to the parties litigant the utmost measure of relief consistent with the issues, enabling them to ob-

[15] Iba v. Central Assn. of Wyoming, 5 Wyo. 355, 42 Pac. 20, 21; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36, 39.

[16] Durrell v. Abbott, 6 Wyo. 265, 44 Pac. 647, 648; Gillis v. Downey, 85 Fed. 483, 488, 29 C. C. A. 286.

[17] Wolverton v. Nichols, 119 U. S. 485, 488, 7 Sup. Ct. Rep. 289, 30 L. ed. 474, 15 Morr. Min. Rep. 309.

[18] 114 Cal. 100, 45 Pac. 1047, 18 Morr. Min. Rep. 410.

tain an adjudication in such form as will secure to them all possible benefits.

While the action in the main may in the state courts be ejectment or to quiet title, it should in some way be earmarked, and its connection with the land department proceeding shown, and this rule is followed in jurisdictions where general allegations in an ordinary action for ejectment are held sufficient for purposes of an adverse suit.[19]

The weight of authority in the mining states supports the view that the allegation of the filing of an adverse is essential to the sufficiency of the complaint, and it has been generally held that the allegation is jurisdictional,[20] and unless this rule is followed, the court might be without jurisdiction.[21]

The department will not ordinarily be controlled by judicial proceedings instituted outside of the sanction of section twenty-three hundred and twenty-six of the Revised Statutes, nor will a judgment rendered in an ordinary action, by which we mean one wholly disconnected with the patent proceeding, be necessarily considered as aiding the department.[22]

It has been held that when an application is made for patent by one of the contending parties during the pendency of an action previously commenced which involved the right of possession of the property, the adverse claimant may file his adverse claim in the land office, and thereupon, by supplemental pleadings in the pending action, convert it into an action under

[19] Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 279.

[20] Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 240.

[21] Id.; and see *ante*, § 108.

[22] 420 M. Co. v. Bullion M. Co., 2 Copp's L. O. 5; Seymour v. Wood, 4 Copp's L. O. 2; Nichols v. Becker, 11 L. D. 8; Cain v. Addenda M. Co., 24 L. D. 18, 20; Bunker Hill & Sullivan M. Co. v. Shoshone M. Co., 33 L. D. 142.

section twenty-three hundred and twenty-six of the Revised Statutes,[22a] and no new suit need be brought,[23] and in such case the plaintiff cannot dismiss so as to leave the adverse without a suit supporting it.[24]

The land department does frequently, but purely as a matter of grace, suspend its proceedings to await the determination of litigation arising between parties claiming rights which are not asserted in the patent proceeding; but this discretionary power is sparingly exercised, and only in cases which appeal to the equitable consideration of the departmental officers.[25]

Ordinarily, it should not exercise this power unless the adjudication by the court of the questions involved in the suit would aid in the disposal of a protest filed in the land department against the patent application.[26]

Where the adverse claim filed in the land office is fatally defective,[27] or where the adverse suit is brought after the thirty day period has elapsed, and even though judgment in the court has been in favor of the adverse claimant,[28] the department will ignore the court proceedings.

Judgments in these extra-departmental actions, while entitled to respect, cannot be accorded the conclusive effect which attaches to a judgment rendered

22a 17 Stats. 93; Comp. Stats. 1901, p. 1430; 5 Fed. Stats. Ann. 35.

23 Jones v. Pacific Dredging Co., 9 Idaho, 186, 72 Pac. 956, citing Northwestern Lode & Millsite, 8 L. D. 437, and Little Giant Lode, 29 L. D. 194.

24 Id., citing Axiom M. Co. v. Little, 6 S. D. 438, 61 N. W. 441.

25 Coleman v. Homestake M. Co., 30 L. D. 364; Cain v. Addenda M. Co., 29 L. D. 62; In re Wolenberg, 29 L. D. 302; Mauser Lode, 27 L. D. 326; Thomas v. Elling, 25 L. D. 495; S. C., on review, 26 L. D. 220; North Star Lode, 28 L. D. 41; Little Giant Lode, 29 L. D. 194.

26 Selma Oil Claim, 33 L. D. 187.

27 Mattes v. Treasury Tunnel Co., 33 L. D. 553.

28 Madison Placer Claim, 35 L. D. 551.

in an adverse proceeding such as contemplated by the statute.[29]

Strictly speaking, so far as the state courts are concerned, the action may not be deemed a continuation of the land office proceedings. Yet the recital of the facts of their commencement and pendency, in connection with the allegation of the plaintiff's qualification and performance of the requirements of the federal laws, as to discovery, location, and other facts showing a valid subsisting mining claim, would necessarily characterize the action as one involving adverse claims to real estate. One may either, in an ordinary action of ejectment or to quiet title, plead the source and history of his title, and in the latter class of actions may plead the facts constituting a cloud upon such title, without the pleadings being open to any serious objection.

It may be safely accepted as a rule that the pleading of the adverse claimant should allege:—

(1) His qualification to receive a patent, i. e., citizenship;

(2) Facts showing the discovery, perfection of the location in accordance with the laws, federal and state, and performance of annual labor, from which facts the legal inference must necessarily be drawn that the claim is a valid and subsisting one.[30]

Some of the authorities hold that it devolves on plaintiff to prove that the land covered by his location was at the date thereof unoccupied and unappropri-

[29] North Star Lode, 28 L. D. 41.

[30] While this is unnecessary according to the rules in some of the states (see Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278; Tonopah Co. v. Douglass, 123 Fed. 936, 940; Campbell v. Taylor, 3 Utah, 325, 3 Pac. 445, 448), the object of this statement is to suggest a form of pleading which will be satisfactory and state a cause of action in any jurisdiction.

ated public land, and that a failure to do this precludes a recovery.[31]

(3) The assertion of the defendant of a hostile right and the commencement by him of the proceedings in the land office to obtain a patent;

(4) The publication of the patent application and the date when the publication period commenced;

(5) The filing of the adverse claim in the land office by the plaintiff, showing the boundaries and extent of the conflict,[32] and the date of such filing;[33]

[31] Cleary v. Skiffich, 28 Colo. 262, 89 Am. St. Rep. 207, 65 Pac. 59, 62, 21 Morr. Min. Rep. 284; Moffatt v. Blue River G. Co., 33 Colo. 142, 80 Pac. 139, 141; Lozar v. Neill, 37 Mont. 287, 96 Pac. 343, 345. See, also, McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538, 539; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 635; Phillips v. Smith, 11 Ariz. 309, 93 Pac. 91, 92; Bismark G. M. Co. v. North Sunbeam G. Co., 14 Idaho, 516, 95 Pac. 14, 19; Cook v. Klonos, 164 Fed. 529, 90 C. C. A. 403. If it is necessary to prove this fact, it would also seem necessary to allege it, and some of the authorities last cited so hold. It has been held that proof of the fact that the land is public land is sufficient to establish a *prima facie* case, since there is a presumption that all public land is unoccupied. Goldberg v. Bruschi, 146 Cal. 708, 711, 81 Pac. 23, 24. And the circuit court of appeals has held that the evidence relating to possession and discovery may be such that the inference may be drawn therefrom that the ground located was at the time of the location vacant and unappropriated public land of the United States. Cook v. Klonos, 164 Fed. 529, 536, 537.

[32] Smith v. Imperial Copper Co., 11 Ariz. 193, 89 Pac. 510, 511.

[33] In some states this allegation is considered jurisdictional. Lily M. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 519; Warnekos v. Cowan, 13 Ariz. 42, 108 Pac. 238, 239. However, as to the misuse of this term "jurisdictional," see Hopkins v. Butte Copper Co., 29 Mont. 390, 74 Pac. 1081, 1082. This latter case holds that it is necessary to allege the filing of the suit within the period of thirty days, and that the filing mark on the complaint, indorsed by the clerk, is not a part of the pleading, though it may be *prima facie* evidence of the fact. The court said that logically it would seem that a failure to file within the required time should be set up as a matter of defense, but that the custom had been followed so long requiring plaintiff to plead it that the court did not feel justified in changing the observed rule. In Colorado, however, the court will take judicial notice of the clerk's file-mark indorsed on the com-

(6) The fact as to possession where such fact is material in determining the character of the action;

(7) If in the federal courts, the diversity of citizenship and jurisdictional value.[34]

The expenditure of five hundred dollars for patent improvements is not an issuable averment, since this is a question solely for the land department.[35]

On the part of the patent applicant, he would be called upon to traverse so much of his adversary's pleading as tended to establish a *prima facie* right of possession in the plaintiff. In addition to this, as the title of each party is brought in question and each party must make proof,[36] the defendant should be called upon to state the origin of his rights, the facts from which the court might infer the ownership in him of a valid and subsisting location, and his qualification to receive the patent.[37]

plaint. Pennsylvania M. Co. v. Bales, 18 Colo. App. 108, 70 Pac. 444. See, also, Rawlings v. Casey, 19 Colo. App. 152, 73 Pac. 1090, 1091; Hain v. Mattes, 34 Colo. 345, 83 Pac. 127, 128.

[34] Yellow Aster M. & M. Co. v. Winchell, 95 Fed. 213, 214.

[35] Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, and note.

[36] Bay State S. M. Co. v. Brown, 10 Saw. 243, 21 Fed. 167, 168; Manning v. Strehlow, 11 Colo. 451, 18 Pac. 625, 627; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 660, 15 Morr. Min. Rep. 329; Becker v. Pugh, 9 Colo. 589, 13 Pac. 906, 908, 15 Morr. Min. Rep. 304; Becker v. Pugh, 17 Colo. 243, 29 Pac. 173; Kendall v. San Juan etc. M. Co., 9 Colo. 349, 12 Pac. 198, 202; Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. 904, 906, 15 Morr. Min. Rep. 324; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312, 1 Morr. Min. Rep. 120; Jackson v. Roby, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Morr. Min. Rep. 26; Burke v. McDonald, 2 Idaho, 646, 33 Pac. 49, 51, 17 Morr. Min. Rep. 325; Gird v. California Oil Co., 60 Fed. 531, 533, 18 Morr. Min. Rep. 45; Girard v. Carson, 22 Colo. 345, 44 Pac. 508, 509, 18 Morr. Min. Rep. 346; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240, 242; Armstrong v. Lower, 6 Colo. 393, 15 Morr. Min. Rep. 631; Funk v. Sterrett, 59 Cal. 613.

[37] Woody v. Hinds, 30 Mont. 189, 76 Pac. 1, 2.

The supreme court of Montana[38] has held that the right to amend defective pleadings in this class of actions is the same as in other actions, and that the objection that the amendment is not made within the thirty-day period for filing the action is not well taken. The supreme court of Arizona, however, refuses to follow this authority, and holds by analogy to the rule governing similar amendments after the statute of limitations has run that where a cause of action is for the first time set forth in an amended complaint after the thirty-day period has elapsed, it is too late to be considered.[39] An amendment by which the party essential to the action is first brought into the suit after the period has expired is too late.[40]

From pleadings framed as above indicated the real questions at issue are easily determined.

This form of pleadings is unquestionably required in most of the states. In California, since the decision in the Altoona-Integral case, and the subsequent cases following the precedent there announced, and heretofore referred to, it would seem unnecessary to frame the pleadings on the lines just suggested. Prior to that decision the uniform practice in that state had been in accordance with the rule followed in other states, and it is to be regretted that the court has seen fit to depart from a rule so uniformly recognized in other mining states. In view of the holding in other states that such allegations are essential to jurisdiction, it would seem the wisest policy to incorporate them in the complaint even in California.

In Wyoming, as we have heretofore seen, general allegations as in ordinary actions have been held to be sufficient.

[38] Id.

[39] Keppler v. Becker, 9 Ariz. 234, 80 Pac. 334, 335.

[40] Holman v. Cent. Montana Co., 34 L. D. 568.

The reason and force of this generally accepted rule as to pleadings will be readily recognized when we come to consider the form of the judgment required in the action.[41]

When the adverse claimant has two or more locations which conflict with the location for which application for patent has been made, but which adverse locations do not conflict with each other, he may file separate adverses and separate actions, and the plea of "action pending" cannot be invoked as a bar to either action.[42]

**§ 756. Time within which action must be commenced.**—The statute,[43] requires the proceeding to be commenced within thirty days after filing the adverse claim, except in Alaska, where it may be instituted at any time within sixty days.[44] The rule for computing the period is the same as applied to filing the adverse claim,[45] that is, the first day is excluded, and if the last day falls on a Sunday or holiday, the proceeding must be commenced on the preceding business day.

> The decided weight of authority is that when the act is to be done within a time fixed by statute, and the last day thereof falls upon Sunday, that day will not be excluded, unless a different rule for computing the time is also provided by statute.[46]

This time may not be extended by the act of the parties, nor can the state enlarge it by its statutes.

41 *Post*, § 763.

42 Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 966.

43 U. S. Rev. Stats., § 2326.

44 36 Stats. at Large, 459; Comp. Stats. (Supp. 1911) 610; 1 Fed. Stats. Ann. (Supp. 1912) 13.

45 See *ante*, § 738.

46 Meyer v. Hot Springs Imp. Co., 169 Fed. 628, 629, 95 C. C. A. 156. See, also, Shefer v. Magone, 47 Fed. 872; Hermann v. United States, 66 Fed. 721, 722.

There is no exception as to the claimant who may be beyond the seas, or under disability of any kind, or who may fail to act from inadvertence or other cause. The suit must be brought within the time specified.[47]

The provisions of the federal statute in this regard are mandatory.[48] The claimant must see to it that the proceedings are actually commenced within the period. If he intrusts that duty to someone else, who fails, the land department cannot redress the wrong or revive the remedy.[49]

It has no authority to waive the requirement.[50]

The adverse claimant is limited to the one action.[51]

Proceedings instituted after the lapse of the thirty-day period will not be considered by the department,[52] and where an amended complaint which for the first time states a cause of action is filed after the period has elapsed, the better rule seems to be that it will not be considered.[53] When a suit has been instituted by an adverse claimant prior to the filing of the application for patent in the land office, the adverse claimant need not institute a new action but can file a supplemental complaint in the action already pending, within the thirty-day period, and alleging facts showing the relationship of the suit to the proceedings in the land department.[54] If for any reason the local land officers reject an adverse claim tendered for fil-

47 Steves v. Carson, 42 Fed. 821, 16 Morr. Min. Rep. 12.

48 Madison Placer Claim, 35 L. D. 551.

49 Pride of the West Mine, 4 Copp's L. O. 341.

50 Downey v. Rogers, 2 L. D. 707.

51 Copp's Min. Dec. 126.

52 Nettie Lode v. Texas Lode, 14 L. D. 180; Seymour v. Wood, 4 Copp's L. O. 2; Pelican Lode, Copp's Min. Dec. 126; Wood v. Hyde, 1 Copp's L. O. 66; Bunker Hill Co. v. Shoshone M. Co., 33 L. D. 142.

53 See *ante*, § 755.

54 Jones v. Pacific Dredging Co., 9 Idaho, 186, 72 Pac. 956.

ing, the adverse claimant must still bring his action in the courts within the thirty days, in order to preserve his rights pending an appeal to the general land office.[55]

**§ 757. Action, when deemed commenced.**—As to when the action or proceeding is deemed to be commenced will depend entirely upon the laws governing practice in the tribunal whose jurisdiction is invoked.

In the federal courts, if the action be upon the equity side, the equity rule must be followed. A suit in equity in a federal court is commenced by suing out the appropriate process and a *bona fide* attempt to serve it. *Bona fides* requires an effort to proceed according to law and to employ the means which the law prescribes.[56] In actions at law the federal courts are governed by the state laws in their respective jurisdictions.

Where the clerk failed to place the file-mark on a complaint in an adverse proceeding and to issue process, the complaint having been received by him within the statutory period, the rights of the adverse claimant were not lost or prejudiced.[57]

In the states and territories the rule varies.

Where, as in Colorado and New Mexico, an action is commenced by filing a complaint or declaration, it is not necessary that process should either issue or be served within the thirty-day period.[58]

In some states the statute on the subject provides that actions shall be commenced by filing a complaint

[55] Scott v. Maloney, 22 L. D. 274; Deniss v. Sinnott, 35 L. D. 304.

[56] United States v. American Lumber Co., 85 Fed. 827, 830, 29 C. C. A. 431.

[57] Emmons v. Marbelite Plaster Co., 193 Fed. 181, 183.

[58] De Garcia v. Eaton, 22 L. D. 16; Mills' Ann. Code (Colo.), §§ 32, 44; Flint v. Powell, 18 Colo. App. 425, 72 Pac. 60, 62.

and issuance of summons. In such cases, unless process is issued within the thirty-day period, the action is not commenced.[59]

This is the rule in Nevada, though an appearance by demurrer or answer does away with the necessity of issuance of summons.[60]

In South Dakota the statute provides that actions can only be commenced by the service of summons. An attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them usually or last resided; but such attempt must be followed by the first publication or actual service within sixty days. In a case where no valid service was attempted for more than a year, it was held that the proceeding was not commenced within the time required by law.[61]

In Utah, an action may be commenced either by filing a complaint with the clerk or by the service of summons.[62]

The foregoing are typical illustrations of the different classes of provisions found in state legislation on this subject. Necessarily, resort will in each instance be had to the laws of the state wherein the action is prosecuted, and as such laws, as a general rule, apply to all classes of actions, it is not necessary to further elaborate the subject here.

**§ 758. Parties to the action.**—The only proper parties to the suit are the adverse claimant and the appli-

[59] Harriet M. Co. v. Phoenix M. Co., 9 Copp's L. O. 165.

[60] Harris v. Helena G. M. Co., 29 Nev. 506, 92 Pac. 1, 2.

[61] Mars M. Co. v. Oro Fino M. Co., 7 S. D. 605, 65 N. W. 19.

[62] West Mountain Lime & Stone Co. v. Danley, 38 Utah, 218, 111 Pac. 647, 650.

cant. Only those who have filed their adverse claims in the land office have any standing in court as parties plaintiff,[63] if we accept the doctrine that the cause of action arises out of the patent proceeding, and unquestionably this is the rule prevailing in the federal courts and in practically all of the state courts.

Of course, parties succeeding to the rights of adverse claimants subsequent to the filing of the adverse claim and prior to the commencement of the adverse suit are proper parties plaintiff.[64]

If the primary object of the suit is to test the right of an individual to a patent, there is but one method of initiating the attack, and that is, by filing the adverse claim. The only one attacked is the one who makes the application for the patent; consequently it would be improper to join in the action parties who do not assert in the land office a right to enter the land.

Third parties may appear as volunteers or protestants before the land officers, and invite attention to the failure of one or the other or both of the contending parties without having the *status* of adverse claimants.[65]

A case may be instanced. The pendency of patent proceedings or a suit in support of an adverse claim does not dispense with the necessity of performing the annual labor,[66] and the ground in controversy may become subject to relocation before the proceedings in court are ultimately determined. If, under such cir-

[63] Mont Blanc Cons. G. M. Co. v. Debour, 61 Cal. 364, 365, 15 Morr. Min. Rep. 286; Nesbitt v. De Lamar's Nevada G. M. Co., 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178, 179, 19 Morr. Min. Rep. 286; Murray v. Polglase, 23 Mont. 401, 59 Pac. 439, 441.

[64] Willitt v. Baker, 133 Fed. 937, 944.

[65] Snowy Peak M. Co. v. Tamarack & Chesapeak M. Co., 17 Idaho, 630, 107 Pac. 60, 61.

[66] *Ante*, § 632.

cumstances, the claim is relocated, the relocator would not be entitled to intervene in the adverse proceeding.

His remedy is limited to a protest before the department,[67] asserting the failure of the two contending parties to comply with the law as to annual labor since the filing of the adverse claim and the commencement of the action therein, which may result in the cancellation of the patent application, if there has been an unreasonable delay in its prosecution,[68] or the relocator may pursue his remedy in the courts regardless of the pendency of the patent proceeding.[69]

Where more than one adverse claim is filed, while, technically speaking, each adverse claimant must institute a separate suit, the actions, if all pending in one tribunal, should be consolidated, unless the law of the forum inhibits this practice.[70] Where one action is pending in a state and another in a federal court, all parties should be brought into one or the other of the cases. This would be necessary to enable the court to determine which, if any, of the contending parties were entitled to apply for patent. All parties are actors, and their presence is necessary to a complete determination of the issues.[71]

Where adverses involving a common conflict are filed the fact is necessarily shown by the records of the local office. It then devolves upon each adverse

[67] In Poore v. Kaufman, 44 Mont. 248, 119 Pac. 785, 788, the court states that such a protest will not be considered by the land department, but the latest ruling of the department says that he may protest without right of appeal. Woodman v. McGilvray, 39 L. D. 574.

[68] *Ante*, § 696.

[69] Id.

[70] See Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, 966, holding that the same adverse claimant having more than one location which conflicts with the claim applied for may, if his claims do not conflict with each other, file separate adverses and separate actions.

[71] Antelope Lode, 2 Copp's L. O. 2, 5.

claimant to see to it that such proceedings are had as will determine his right, not alone against the applicant for patent, who is the common defendant, but also against the other adverse claimants. Until this is done the stay of proceedings commanded by section twenty-three hundred and twenty-six of the Revised Statutes is not relieved, and the 'controversy' is not 'settled or decided by a court of competent jurisdiction.' The word 'controversy' used in this section includes broadly the right of possession to the area in conflict against all who are contending therefor in the manner prescribed by the statute.[72]

**§ 759. Functions of the land department pending the action.**—As heretofore noted,[73] the filing of the adverse claim suspends the powers of the land department, except for certain limited purposes. Should no action in support of the claim be commenced within the thirty-day period, it is deemed waived, and the register and receiver may proceed as if no adverse claim had ever been filed.

Formerly the adverse claimant was required to give the land officers proper notice of the commencement of the action, otherwise it was presumed that the claim was waived;[74] but the existing regulations require that, before resuming control over the proceeding, after the filing of the adverse claim, where no suit has been commenced against the applicant for patent, such applicant must present a certificate to that effect from the clerk of the state court having jurisdiction in this class of cases, and also one from the clerk of

[72] Woods v. Holden, 26 L. D. 198; S. C., on review, 27 L. D. 375.

[73] *Ante*, § 741.

[74] Beatty and Clements, 2 Copp's L. O. 82; Circ. Instructions, 9 Copp's L. O. 148; Halsey v. Hewitt, 5 Copp's L. O. 162.

the United States district court for the district in which the claim is situated.[75]

The department claims the right to determine for itself the question of fact in each case as to whether or not the action has been commenced within the statutory period;[76] but when an action has been commenced, and the controversy arises in the court where the action is pending as to whether it was commenced in time or not, the determination of this fact will be left to the court, and the department will decline to proceed until the matter is there disposed of.[77]

This ruling was followed where a court had made a *nunc pro tunc* order after the period for filing had elapsed.[78] However, in a case where the objection that the suit was filed too late had not been made in court but the case tried and allowed to go to judgment, the land department subsequently dismissed the adverse claim when the fact that the suit had been filed on the thirty-first day was called to its attention.[79]

The objection that a suit was not commenced in time must be brought to the attention of the trial court by answer or some appropriate plea, if allowed under the

[75] Gen. Min. Reg., par. 88, Appendix.

It is the practice in some of the land districts to require in all cases a certificate from the clerk of the state court that no action is pending involving the tract applied for. In the absence of the filing of an adverse claim, the necessity for this certificate does not exist unless the application is prosecuted under section twenty-three hundred and thirty-two of the Revised Statutes, when such certificate must be presented under paragraph 76 of the "General Mining Regulations," Appendix. (*Ante*, § 688.)

[76] Catron v. Lewisohn, 23 L. D. 20.

[77] Id.

[78] Gypsum Placer Claims, 37 L. D. 484. See, also, Richmond M. Co. v. Rose, 114 U. S. 576, 582, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273.

[79] In re Madison Placer, 35 L. D. 551.

practice, in the nature of a plea in abatement. It cannot be raised for the first time in the appellate court.[80]

The adverse claimant is required to prosecute his action with due diligence. What constitutes such diligence must be determined by the court before whom the action is pending.[81] The question of diligence in the prosecution of a pending suit is as much a question for the determination of the court as any other question of law or fact which may arise in the progress of the case.[82] The department will not undertake to adjudicate it.[83] The patent applicant must apply to the court to dismiss the action for failure to prosecute it with proper diligence, and come into the land office with a judgment of dismissal.[84]

Such a judgment is accepted as establishing an abandonment or waiver of the adverse claim.

The action once commenced, the stay of proceedings in the land office, which became effectual upon the filing of the adverse claim, is prolonged and continued in force until the controversy shall have been settled or decided by the court. Until the decision of that tribunal is obtained, the function of the land department remains suspended.[85]

[80] Providence G. M. Co. v. Marks, 7 Ariz. 74, 60 Pac. 938, 939. See Hain v. Mattes, 34 Colo. 345, 83 Pac. 127, 128, holding that such defects must be taken advantage of by demurrer or answer.

[81] Cone v. Jackson, 12 Colo. App. 461, 55 Pac. 940, 941; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278.

[82] Iowa M. Co. v. Bonanza M. Co., 6 Copp's L. O. 75.

[83] Davis v. McDonald, 33 L. D. 641.

[84] See Ring v. Montana L. & R. Co., 33 L. D. 132, holding that the pending suit must not be a dead suit subsisting solely as a matter of record and which it is within the power of the patent applicant to cause to be dismissed.

[85] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 693, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, 18 Morr. Min. Rep. 205; Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308; Doon v. Tesh, 131 Cal. 406, 63 Pac.

But where the conflicting portion of a lode claim has been expressly excluded from an application for patent, the institution of adverse proceedings against another application for another lode claim embracing the excluded area will not justify delay or laches in prosecuting the first application.[86]

Where more than one action has been commenced, based upon separate adverse claims, the department awaits a judgment which will determine the rights of all the parties.[87]

All acts of the department performed, or attempted to be performed, while a suit is pending, are null and void.[88]

After an adverse claim is filed and the adverse claimant institutes his proceeding in the courts, no act of the applicant can deprive his adversary of the right of prosecuting the action to a final determination. A

764; In re Clipper M. Co., 22 L. D. 527; In re Little Giant Lode, 22 L. D. 629; Jamie Lee Lode v. Little Forepaugh, 11 L. D. 391; Swaim v. Craven, 12 L. D. 294; Iowa M. Co. v. Bonanza, 6 Copp's L. O. 75; Robinson v. Mayger, 1 L. D. 538; Iola Lode Case, 1 L. D. 539; Ovens v. Stephens, 2 L. D. 699; Meyer v. Hyman, 7 L. D. 83; Aspen Mt. Tunnel Lode No. 1, 26 L. D. 81; In re Burton, 29 L. D. 235; Marburg Lode, 30 L. D. 202, 208.

[86] Little Annie No. 5 Claim, 30 L. D. 488.

[87] Black Queen Lode v. Excelsior No. 1 Lode, 22 L. D. 343.

[88] Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; McEvoy v. Hyman, 25 Fed. 539, 548, 596, 15 Morr. Min. Rep. 300, 397; Deeney v. Mineral Creek M. Co., 11 N. M. 279, 67 Pac. 724, 726, 22 Morr. Min. Rep. 47; Long John Lode, 30 L. D. 298.

The department has ruled that a mineral entry irregularly allowed during the pendency of adverse proceedings will not be canceled for such irregularity where subsequently thereto the adverse claim is dismissed, leaving the applicant in the same *status* as though no adverse claim had been filed. Mutual M. & M. Co. v. Currency Co., 27 L. D. 191. And an application received by mistake will be allowed to stand pending determination of an adverse suit which has been instituted, even though another application for a portion of the same land had been previously accepted. Wanda G. M. Co. v. E. F. C. etc. Co., 31 L. D. 140.

dismissal of the patent application, or an abandonment of the proceedings by the applicant as to the area in conflict, will not authorize the land officers to resume control of the proceedings.

> The adverse claim is the claim made by the party opposing the application, and the party to waive a claim is the one who makes it. The obvious meaning is, that when an adverse claim is filed, that is, a claim filed by some one opposing the application in whole or in part, the proceedings in the land office shall be stayed until the determination of the dispute by the court in which the action is brought, or the party who has presented such adverse claim shall, in some way, have waived his opposition to the application.[89]

Where before any adverse claim is filed the applicant relinquishes the land within a conflict, although his published notice still includes the land, the relinquishment filed in the land office restores the land to the public domain, and no adverse proceeding can be instituted as to the released area, and if instituted it will be of no avail.[90]

## Article III. The Judgment and Its Effect.

§ 763. Form of judgment.
§ 764. When judgment becomes available in the land office.
§ 765. Effect of the judgment.
§ 766. Adverse claim—How waived.

**§ 763. Form of judgment.**—The supreme court of Idaho is of the opinion that since the act of March 3, 1881, it is necessary that the decision, whether by the

[89] Last Chance M. Co. v. Tyler, 157 U. S. 683, 693, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, 18 Morr. Min. Rep. 205; Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391, 393.

[90] Shields v. Simington, 27 L. D. 369.

court or jury, must show not only that the successful party is entitled to the possession as against his opponent, but also against all others, including the government, and by compliance with all the laws applicable.

> The government is interested in knowing, before issuing its patent to a party, that he is a citizen, that he has discovered a vein, that he has performed the development work, that he has complied with the law.[91]

The court takes the view that where the action is tried by a jury there must be a special verdict. This necessarily implies that when the case is tried by the court there must be a special finding on all facts necessary to show the qualification of the successful party and his compliance with the law.

This accords with a previous ruling by the same court[92] and with the doctrine prevailing in Colorado,[93] which is sanctioned, inferentially at least, by the supreme court of the United States.[94] As was said by that court,—

> The manifest object of the act was to provide for an adjudication that neither party was entitled to the property, so that the applicant could not go forward with the proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed.[95]

[91] Burke v. McDonald, 2 Idaho, 646 (679), 33 Pac. 49, 50, 17 Morr. Min. Rep. 325.

[92] Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. 904, 906, 15 Morr. Min. Rep. 324.

[93] McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 15 Morr. Min. Rep. 329; Manning v. Strehlow, 11 Colo. 451, 455, 18 Pac. 625, 627; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019, 1020, 16 Morr. Min. Rep. 122.

[94] Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 45 Morr. Min. Rep. 482.

[95] Perego v. Dodge, 163 U. S. 160, 167, 16 Sup. Ct. Rep. 971, 41 L. ed. 113; Brown v. Gurney, 201 U. S. 184, 191, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

In New Mexico a verdict of "guilty" in an action of ejectment was held sufficient to show that the plaintiff was entitled to possession, and since this exhausts the field of controversy as between plaintiff and defendant, and all others are barred by failing to file adverse claims, it leaves only the government to be reckoned with.[96]

In the ordinary action of ejectment a defendant may usually rely upon the weakness of plaintiff's title;[97] but in the proceeding contemplated by the Revised Statutes, in the light of the amendment of March 3, 1881, both parties are regarded as actors,[98] and each party must show his own title.[99] Some of the rules

[96] Upton v. Santa Rita Mining Co., 14 N. M. 96, 89 Pac. 275, 280, 281. This case considers the question at length, and reviews the Idaho and Colorado authorities, and holds that these authorities state the rule too strictly. The court relies on the case of Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. Rep. 863, 39 L. ed. 1046, 18 Morr. Min. Rep. 224, where a verdict in similar form was upheld and followed with approval in the later case of Maloney v. Adsit, 175 U. S. 281, 289, 20 Sup. Ct. Rep. 115, 44 L. ed. 163. The New Mexico court conceded the right to a special verdict as provided in the local statutes.

[97] Schroeder v. Aden Gold M. Co., 144 Cal. 628, 78 Pac. 20, 21. However, the supreme court of Washington has said, in deciding an ordinary action of ejectment when an adverse claim was not involved, that "in possessing actions to recover unpatented mining claims, the rule of ejectment, namely, that the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's, does not apply. In actions of this sort the better title prevails." National M. & M. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128, 130.

[98] Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019, 1020, 16 Morr. Min. Rep. 122; Jantzon v. Arizona Copper Co., 3 Ariz. 6, 20 Pac. 93, 94; Murray Hill M. & M. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762, 764; Connolly v. Hughes, 18 Colo. App. 372, 71 Pac. 681, 683; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278; Willitt v. Baker, 133 Fed. 937.

[99] Brown v. Gurney, 201 U. S. 184, 190, 26 Sup. Ct. Rep. 509, 50 L. ed. 717.

pertaining to ordinary actions are in consequence necessarily modified in the trial of such causes.[100]

The plaintiff may be nonsuited, but this will not avail the defendant unless he thereupon proceeds to establish his rights affirmatively and secures a judgment.[1]

When, however, the plaintiff wholly fails to establish even a *prima facie* case, he is no longer interested in the litigation and cannot avail himself of the privilege of challenging the rulings of the court, made during the subsequent progress of the trial which results in favor of the defendant. Defendant may either have a nonsuit or proceed without further molestation from plaintiff.[2] By failing to establish a *prima facie* right the plaintiff is precisely in the same position as if he had waived his adverse claim leaving defendant free to proceed.[3] If this be true, it would seem that the court had nothing to do but to enter judgment, or dismiss the suit, unless the defendant asked for an affirmative judgment.[4] A judgment in favor of plain-

100 Becker v. Pugh, 9 Colo. 589, 593, 13 Pac. 906, 15 Morr. Min. Rep. 304; Manning v. Strehlow, 11 Colo. 451, 18 Pac. 625; Murray Hill M. & M. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762, 764; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 635, 21 Morr. Min. Rep. 393.

1 Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633; Connolly v. Hughes, 18 Colo. App. 372, 71 Pac. 681, 683; Brien v. Moffitt, 35 L. D. 32; McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538, 539.

2 Connolly v. Hughes, 18 Colo. App. 372, 71 Pac. 681, 683; McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538, 539; Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 1049; S. C., in error, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. ed. 1119; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 86, 68 L. R. A. 833, and note; Milwaukee Gold Ext. Co. v. Gordon, 37 Mont. 209, 95 Pac. 995, 1000; Moffatt v. Blue River Gold Ext. Co., 33 Colo. 142, 80 Pac. 139, 141; Lozar v. Neill, 37 Mont. 287, 96 Pac. 343, 346; McMillen v. Ferrum, 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461, 464.

3 Id.

4 McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538, 539.

tiffs in an adverse suit will not be permitted to stand where it appears that the judgment is based upon a location brought into existence long after the expiration of the period for adversing; otherwise, plaintiffs, by complying with the provisions of section twenty-three hundred and twenty-six of the Revised Statutes, would be entitled to a patent which would not be based on their adverse.[5]

If in the trial of an adverse suit there is any testimony submitted upon which to base a contention that the area in conflict should be divided between the parties, it is the duty of the court to permit the testimony to go to the jury with an instruction, if requested, as to their right and privilege in the consideration of such evidence and as to what their verdict might be if they believe it.[6]

The supreme court of Montana expresses the opinion[7] that in view of the peculiar nature of these cases, and in view of the revised equity practice,[8] by means of which nearly all equity cases can be disposed of on appeal, it would be more expeditious if trial courts would not order nonsuits but hear the testimony of both sides, so that only one trial would be necessary. However, the court said that this was a matter for the legislature to regulate, and that the courts must proceed according to established practice.

It is no objection to a judgment that it follows and rests upon a stipulation between the parties.[9]

The judgment cannot include land in excess of the area described in the adverse claim. As to everything

[5] Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015, 1017.

[6] Currency Mining Co. v. Bentley, 10 Colo. App. 271, 50 Pac. 920.

[7] Lozar v. Neill, 37 Mont. 287, 96 Pac. 343, 346.

[8] Laws, 2d Ex. Sess. 1903, p. 7.

[9] Stranger Lode, 28 L. D. 321; Greater Gold Belt M. Co., 28 L. D. 398; Carrie S. Gold M. Co., 29 L. D. 287; In re Conway, 29 L. D. 388.

else outside of the boundaries of the conflicting area as shown in the field adverse, rights are conclusively presumed to be waived.[10]

**§ 764. When judgment becomes available in the land office.**—The judgment referred to in the statutes must necessarily be a final judgment. Secretary Teller was of the opinion that the successful litigant need not wait for the time to appeal to elapse, but that unless the defeated party perfected an appeal so as to secure a stay of proceedings in the trial court, the one in whose favor judgment was rendered might file his judgment-roll in the land office, and that tribunal would thereupon resume jurisdiction for the purpose of disposing of the land involved, notwithstanding the fact that the right of appeal still existed.[11]

Strictly speaking, an action is deemed pending until the time for appeal has passed. In some states this rule is declared by statute. Where such rule prevails, the judgment during this period is not admissible in another case as evidence, even between the same parties,[12] upon the theory that the estoppel is not complete until the period for appeal elapses.

If this rule is to be strictly enforced in this class of actions, so as to prevent the judgment from being utilized in the land office during this period, it enables one against whom the judgment is entered to avoid its force for a considerable time by simply doing nothing.

[10] Lily Min. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 521.

[11] Noonan v. Caledonian G. M. Co., 10 Copp's L. O. 167. (Application for patent filed by successful adverse claimant prior to the lapse of the period allowed for appeal.)

[12] Harris v. Barnhart, 97 Cal. 546, 550, 32 Pac. 589, 590; Naftger v. Gregg, 99 Cal. 83, 88, 37 Am. St. Rep. 23, 33 Pac. 757, 759; Estate of Blythe, 99 Cal. 472, 34 Pac. 108, 109; Brown v. Campbell, 100 Cal. 635, 647, 38 Am. St. Rep. 314, 35 Pac. 433, 436.

In none of the states will the prevailing party be prevented from availing himself of an ordinary judgment by the issuance of final process, unless the defeated party perfects his appeal and stays proceedings by giving the necessary bond. Unless such proceedings are thus stayed, it is possible, reasoning from analogy, that the successful litigant may be permitted to present his judgment-roll to the land department and thereafter proceed to avail himself of the fruits of his litigation. When such a stay is effected according to the rules of practice governing the tribunal where the action is tried, the land department would be compelled to abide the event of the appeal. Otherwise the appellant would, for all practical purposes, be denied the right of appeal. But where no such stay is effected, the question is not free from embarrassment. So long as the right of appeal exists, the courts cannot be said to have lost jurisdiction.[13] So long as the courts retain jurisdiction, the powers of the land department are suspended. Where a patent is issued after a judgment by the trial court and before the time for appeal has passed, its operative force may be destroyed should the judgment be ultimately reversed, even if the department did not absolutely exceed its jurisdiction. The applicant would proceed to patent at his peril. The mere statement of this proposition involves the suggestion of lack of jurisdiction. The only safe doctrine is to consider a judgment as final only after the time to appeal has passed.

[13] "It is probable that the filing of the judgment-roll would not entitle the claimant to a patent under the United States statute in the face of evidence that an appeal has been taken or was being taken or that proceedings for a new trial were pending." Doon v. Tesh, 131 Cal. 406, 63 Pac. 764, 765.

**§ 765. Effect of the judgment.**—Section twenty-three hundred and twenty-six further provides:—

> After such judgment shall have been rendered the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees; whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general; whereupon the register shall certify the proceedings and judgment-roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights.

The trial of the action may result in one of four judgments: (*a*) in favor of plaintiff, the adverse claimant; (*b*) in favor of the defendant, the patent applicant; (*c*) adjudging that neither party has complied with the law;[14] and (*d*) dividing the conflict area between the parties.[15]

[14] Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197, 199; Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856. For an instance where a judgment of this class was rendered, see Durant v. Corbin, 94 Fed. 382, 384; Willitt v. Baker, 133 Fed. 937, 949.

[15] Currency M. Co. v. Bentley, 10 Colo. App. 271, 50 Pac. 920; In re Conway, 29 L. D. 388.

Where the judgment is, that neither party has established a right of possession, the presentation of the judgment-roll to the land department effectually terminates the proceeding. It has performed its office. The land officers will not undertake to retry the issues submitted to the court; nor is the land department in any sense an appellate tribunal. It accepts the judgment as concluding the present right of both contending parties.[16] The effect of such a judgment is to prevent either party from proceeding further in the land office.[17] The withdrawal of the land affected by the filing of the application[18] is removed, and the tract in controversy becomes subject to new applications.[19]

Where the judgment is in favor of the applicant for the entire area in conflict, the usual result following it is the issue of the patent in due time; but in such case the final passing of the title is not on the judgment of the court independent of that of the commissioner of the general land office, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment-roll.[20]

The department does not undertake to try the merits of the adverse claim. By the judgment the adverse claimant is eliminated from the proceeding,[21] and the land officers confine themselves to investigat-

16 Newman v. Barnes, 23 L. D. 257; Brien v. Moffitt, 35 L. D. 32.

17 Providence Gold M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 644, 19 Morr. Min. Rep. 625.

18 *Ante*, § 679.

19 Brien v. Moffitt, 35 L. D. 32.

20 In re Alice Placer Mine, 4 L. D. 314, 12 Copp's L. O. 274.

21 Evans v. Randall, 3 Copp's L. O. 2; In re Taylor, 9 Copp's L. O. 92; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 644, 19 Morr. Min. Rep. 625.

ing the proofs presented by the applicant. Thenceforward the proceeding is between the applicant and the government, though the unsuccessful adverse claimant may still by way of protest call the department's attention to alleged irregularities in the patent application which were not determined by the court in its judgment awarding applicant the right of possession.[22]

Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the land department to pass upon the sufficiency of the proofs, to ascertain the character of the land,[23] and determine whether the conditions of the law have been complied with in good faith.[24]

The government is not a party to the suit and is not bound to issue a patent to a successful litigant. The judgment simply determines the "right of possession" and not the right to a patent.[25]

As to all matters which by statute are exclusively confided to the courts, the conclusive and binding force of the judgment is fully recognized by the department.[26] As to other matters, the department exercises its power of investigation and determination.

One may obtain a judgment awarding him the right of possession and yet not be properly equipped to re-

[22] Hughes v. Ochsner, 27 L. D. 396; Opie v. Auburn G. M. & M. Co., 29 L. D. 230.

[23] Aurora Lode v. Bulger Hill Placer, 23 L. D. 95.

[24] Text quoted with approval in Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 232, 24 Sup. Ct. Rep. 632, 48 L. ed. 944. See, also, Perego v. Dodge, 163 U. S. 160, 168, 16 Sup. Ct. Rep. 971, 41 L. ed. 113, approving Alice Placer, *supra*.

[25] Butte L. & I. Co. v. Merriman, 32 Mont. 402, 108 Am. St. Rep. 590, 80 Pac. 675, 678; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275, 278; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 234, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[26] In re Conway, 29 L. D. 388.

ceive the patent. The judgment-roll proves the right of possession only.[27]

The land department must, under the law, be the judge as to when, under what circumstances, and how the government shall part with its title.[28]

Where the judgment awards to the applicant only a part of the land in controversy, he may proceed to patent for that part, together with the area which was not involved in the conflict, provided the tract awarded to the adverse claimant does not cover the discovery and workings of the applicant. Such loss of discovery and workings destroys the right of the claimant to the remainder of his claim outside of the conflict area.[29] In case of lode claims, such a judgment may result in giving to the applicant an irregularly shaped surface, and if he proceeds to patent without rectifying his boundaries, so as to secure parallel end-lines, his extra-lateral right may at some future time be challenged. Where such surface irregularities result, an amended survey, eliminating the conflict area and rectifying lines *within the limits of the original survey,* would be more than advisable. Where, as the result of an adverse proceeding, a portion of a conflict area is excluded in favor of the adverse claimant, proper amendment made necessary by the judgment should be made and certified by the surveyor-general upon the official plat and in the field-notes of survey of the claim, so that the boundaries and areas of both that portion of the claim entered and that so excluded shall be defi-

[27] Branagan v. Dulaney, 2 L. D. 744, 751, 11 Copp's L. O. 67.

[28] Apple Blossom Placer v. Cora Lee Lode, 14 L. D. 641, 642, citing Moore v. Robbins, 96 U. S. 530, 532, 24 L. ed. 848. Text quoted with approval in Clipper M. Co. v. Eli M. & L. Co., 33 L. D. 660; S. C., on review, 34 L. D. 401.

[29] Gwillim v. Donnellan, 115 U. S. 45, 50, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482.

nitely shown and described.[30] No new territory could be included, for the simple reason that it would require reopening the whole proceeding and necessitate a reposting and republication.[31]

The judgment being the conclusion of proceedings essentially *in rem*,[32] its operation could not be extended over land not within the boundaries described in the published and posted notices. No jurisdiction could be acquired by the land department as to such additional ground without the institution of proceedings *de novo*. Nor could a judgment in favor of an adverse claimant properly embrace any part of the tract applied for outside the limits of the ground described in the filed adverse,[33] for the court has no jurisdiction to determine any matters with reference to any part of the adverse location other than that embraced in the conflict.[34]

As to the certificate of five hundred dollars improvements required to be furnished, we have heretofore noted that, under section twenty-three hundred and twenty-five of the Revised Statutes, such certificate is required to be filed by the applicant, and that ordinarily it is appended to the field-notes which are used as the basis of the patent proceedings.[35]

It is seldom that the successful adverse claimant is content to limit his application for patent to so much of the claim as was awarded him within the limits of his adversary's application. He may, however, avail himself of such privilege. To do so he must cause the tract to which he was awarded the right of possession by the judgment to be surveyed and platted

[30] In re Donlan, 39 L. D. 353.
[31] Victor No. 3 Lode, 28 L. D. 436.
[32] *Ante*, § 713.
[33] Lily M. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 519.
[34] Mares v. Dillon, 30 Mont. 144, 75 Pac. 969, 970.
[35] *Ante*, § 673.

under the supervision of the surveyor-general, and must present the certificate of that officer establishing the fact that five hundred dollars in improvements have been expended upon or for the benefit of the tract applied for.

The department will thereupon proceed to investigate the character of the land, the proofs submitted, and the compliance by the adverse claimant with the requirements of the law. So far as the premises thus applied for are involved, the former patent applicant is eliminated from the proceeding, except that he may appear as a protestant and raise such questions as were not properly determinable by the court. Usually, the matter rests thereafter between the government and the adverse claimant.

The certificate named in section twenty-three hundred and twenty-six of the Revised Statutes undoubtedly refers to a successful adverse claimant who desires to proceed to patent for such portion of the tract as may be awarded him.

Where, by the judgment, the adverse claimant is awarded any portion of the tract in controversy, he may be permitted to enter the tract allotted him, upon complying with the requirements of the law and the regulations of the department.

But in proceeding to entry, the successful adverse claimant is necessarily limited to that portion of the ground which is within the boundaries of the tract as described in the applicant's plat and published notices, and also within the boundaries to which he asserted title in his adverse.[36] As to such portion, all the world, except the government, is concluded by the patent proceeding and the lapse of time for presenta-

[36] Lily Min. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518, 519; Mares v. Dillon, 30 Mont. 144, 75 Pac. 969, 970.

tion of adverse claims; but as to any other land, no patent can issue without presenting an application and proceeding regularly with posting and publication. Without this there is no jurisdiction in the department to grant any land outside of that embraced within the original patent application.[37]

**§ 766. Adverse claim—How waived.**—An adverse claim may be waived,—

(1) By failure to file it within the statutory period;[38]

(2) By a voluntary dismissal of it in the land office prior to the commencement of the action.[39] Secretary Lamar ruled that this might also be done after the commencement of the action, and without entertaining a discontinuance in the court;[40]

(3) By a transfer to the applicant of the interests of the adverse claimant;[41]

(4) By a dismissal of the action instituted in support of it.[42]

[37] Antelope Lodge, 2 Copp's L. O. 2, 5; Roman Placer Claim, 34 L. D. 260.

[38] *Ante*, § 742.

[39] Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Brady's Mortgagees v. Harris, 29 L. D. 89.

[40] St. Lawrence M. Co. v. Albion Cons. M. Co., 4 L. D. 117.

[41] Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273.

[42] Richmond M. Co. v. Rose, 114 U. S. 576, 585, 5 Sup. Ct. Rep. 1055, 29 L. ed. 273; Whitman v. Haltenhoff, 19 L. D. 245; Monroe Lode, 4 L. D. 273, 12 Copp's L. O. 264; Mono M. Co. v. Magnolia E. & W. Co., 2 Copp's L. O. 68; Stranger Lode, 28 L. D. 321. As to evidence of dismissal required by department, see Circ. Instructions, June 8, 1883, 2 L. D. 725.

# CHAPTER VI.

## THE CERTIFICATE OF PURCHASE AND TITLE CONVEYED THEREBY.


§ 770. Issuance of the certificate.
§ 771. The title conveyed by the certificate of purchase.
§ 772. Power of the land department to suspend or cancel the certificate.
§ 773. The certificate of purchase as evidence — Collateral attack.


**§ 770. Issuance of the certificate.**—If, upon the presentation of the judgment-roll (where adverse suits have been brought) to the register and receiver, and the submission of such supplemental proofs as are required by departmental regulations, these officers are satisfied that the applicant for patent has fully and fairly fulfilled the requirements of the law, and that the land is mineral in character, an indorsement is made upon the application to purchase,[1] allowing the entry. Thereupon the entryman pays the purchase price of the land (five dollars per acre for lode claims and two dollars and fifty cents per acre for placers, for each acre or fraction thereof) to the receiver, who issues his receipt in duplicate, the original being forwarded, with the record in the case, to the commissioner of the general land office. The duplicate is delivered to the purchaser. In addition to this the register sometimes issues a certificate of entry, but usually in this class of cases all that the purchaser receives is the duplicate receipt, which is treated as, and performs the functions of, a certificate of purchase. It describes the tract by its name and locality, and the lot number given by the surveyor-general, and

[1] *Ante*, § 694.

states the area and amount paid therefor. When we speak of the certificate of purchase, we refer generally to this duplicate receipt, which must be surrendered when the patent is issued.

**§ 771. The title conveyed by the certificate of purchase.**—Strictly speaking, the certificate of purchase does not convey or purport to convey the legal title.[2] As between the purchaser and the government, it carries the complete equitable title. It is evidence that the recipient has complied with all the terms and conditions which entitle him to a patent to the tract therein described, and that he has acquired a vested interest therein. The public faith has been pledged to him, and any subsequent grant of the same land to another party is void, unless the entry is vacated or set aside.[3]

When the price is paid, the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land department causes delay; but such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties.[4]

[2] Gourley v. Countryman, 18 Okl. 220, 90 Pac. 427, 430.

[3] Wirth v. Branson, 98 U. S. 118, 121, 25 L. ed. 86; Murray v. Montana Lumber Mfg. Co., 25 Mont. 14, 63 Pac. 719, 721.

[4] Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 431, 12 Sup. Ct. Rep. 877, 36 L. ed. 762, 17 Morr. Min. Rep. 488 (approving American Hill Q. M., Sickle's Min. Dec. 377, 385, 5 Copp's L. O. 114, 6 Copp's L. O. 1); Aurora M. Co. v. 85 M. Co., 34 Fed. 515, 518, 12 Saw. 355, 15 Morr. Min. Rep. 581; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308, 309; Teller v. United States, 113 Fed. 273, 279, 51 C. C. A. 230; Olive Land & Dev. Co. v. Olmstead, 103 Fed. 568, 20 Morr. Min. Rep. 700; Crane's Gulch Min. Co. v. Scherrer, 134 Cal. 350, 86 Am. St. Rep. 279, 66 Pac. 487, 488, 21 Morr. Min. Rep. 549; Neilson v. Champagne M. & M. Co., 111 Fed.

A right to a patent once vested is treated by the government as equivalent to a patent, so far as it may be necessary to cut off intervening claimants.[5]

After the issuance of the certificate, the government holds the legal title in trust for the holder of the certificate.[6]

The receiver's receipt of one in possession, claiming land under it, in accordance with the provisions of section twenty-nine hundred of the Revised Statutes, constitutes ample title as against a wrongdoer who does not connect himself with any claim or interest in the land to warrant a recovery from him of all damages which he causes to the property.[7]

**§ 772. Power of the land department to suspend or cancel the certificate.**—As we have heretofore noted, the commissioner of the general land office has authority in proper cases to cancel or suspend the entry evidenced by the certificate,[8] and that in turn the secretary of the interior exercises a supervisory control

655, 656, 21 Morr. Min. Rep. 664; Southern Cross G. M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423, 424; Morrow v. Warner Livestock Co., 56 Or. 312, 101 Pac. 171, 184.

[5] Stark v. Starrs, 6 Wall. (U. S.) 402, 418, 18 L. ed. 925; McCormick v. Night Hawk & Nightingale G. M. Co., 29 L. D. 373; Nielson v. Champagne M. & M. Co., 29 L. D. 491.

[6] Deffeback v. Hawke, 115 U. S. 392, 405, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Witherspoon v. Duncan, 4 Wall. (U. S.) 210, 218, 18 L. ed. 339; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 434, 12 Sup. Ct. Rep. 877, 36 L. ed. 762, 17 Morr. Min. Rep. 488; Cornelius v. Kessel, 128 U. S. 456, 460, 9 Sup. Ct. Rep. 122, 32 L. ed. 482; Hamilton v. Southern Nev. G. & S. M. Co., 13 Saw. 113, 33 Fed. 562, 566, 15 Morr. Min. Rep. 314; Amador-Medean G. M. Co. v. South Spring Hill, 13 Saw. 523, 36 Fed. 668, 669; Bash v. Cascade M. Co., 29 Wash. 60, 69 Pac. 402, 403.

[7] Gulf C. & S. F. Ry. Co. v. Clark, 101 Fed. 678, 41 C. C. A. 597, and cases cited.

[8] *Ante*, § 662.

over the decisions, rulings, and acts of the commissioner.[9]

The judgment of the register and receiver in allowing the entry and issuing the certificate of purchase or duplicate receipt, is not necessarily final as between the entryman and the government. Upon proper protest filed, the commissioner may order a hearing after entry, for the purpose of determining whether the claimant has complied with the law as to grounds of such protest.[10] The exercise of this supervisory power is necessary to the due administration of the law by the land department;[11] yet the power may not be arbitrarily exercised[12] nor exercised without notice to the entryman.[13]

[9] *Ante*, § 663.

[10] Hughes v. Ochsner, 27 L. D. 396; Opie v. Auburn G. M. & M. Co., 29 L. D. 230.

[11] Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. Rep. 122, 32 L. ed. 482; Brown v. Hitchcock, 173 U. S. 473, 478, 19 Sup. Ct. Rep. 485, 43 L. ed. 772; Hosmer v. Wallace, 47 Cal. 461 (cited in Orchard v. Alexander, 157 U. S. 372, 380, 15 Sup. Ct. Rep. 635, 39 L. ed. 737); Swigart v. Walker, 49 Kan. 100, 30 Pac. 162; Vance v. Kohlberg, 50 Cal. 346, 349; Jones v. Meyers, 2 Idaho, 794, 35 Am. St. Rep. 259, 26 Pac. 215, 216; Whitney v. Spratt, 25 Wash. 62, 87 Am. St. Rep. 738, 64 Pac. 919, 920; Vantongeren v. Heffernan, 5 Dak. 180, 226, 38 N. W. 52, 56. See note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30; Rebecca Gold M. Co. v. Bryant, 31 Colo. 119, 102 Am. St. Rep. 17, 71 Pac. 1110, 22 Morr. Min. Rep. 538; Reed v. Bowson, 32 L. D. 383.

[12] Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. Rep. 122, 32 L. ed. 482; Olive L. & D. Co. v. Olmstead, 103 Fed. 568, 574, 20 Morr. Min. Rep. 700; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 43; Rebecca Gold M. Co. v. Bryant, 31 Colo. 119, 102 Am. St. Rep. 17, 71 Pac. 1110, 1112, 22 Morr. Min. Rep. 538; Southern Cross Gold M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423; Peyton v. Desmond, 129 Fed. 1, 9, 63 C. C. A. 651; United States v. Detroit Lumber Co., 200 U. S. 321, 338, 26 Sup. Ct. Rep. 282, 50 L. ed. 499; Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338.

[13] Orchard v. Alexander, 157 U. S. 372, 383, 15 Sup. Ct. Rep. 635, 39 L. ed. 737; Parsons v. Venzke, 164 U. S. 89, 91, 17 Sup. Ct. Rep. 27, 41 L. ed. 360; Hawley v. Diller, 178 U. S. 476, 489, 20 Sup. Ct. Rep. 986,

The line of demarcation between what is the lawful exercise of this power and what is an arbitrary and unlawful use of it is not clearly defined.

Where upon the face of the record it appears that the entry was illegally allowed, and that in issuing the certificate the local officers exceeded their authority, there can be no question that it is not only the right but the duty of the commissioner to either suspend it, if the irregularities or defects are of such a nature that they may be remedied by supplemental proceedings, or to cancel it when the objection is jurisdictional and incurable.

So, where fraud is apparent or is brought to the notice of the commissioner, he is not bound to remain passive, allowing a proceeding to be consummated which it would be his duty to take immediate steps to annul.[14]

Some of the federal trial courts have been disposed to hold that where fraud is perpetrated and the issuance of the certificate is procured by resort to fraudulent methods, the remedy of the government is by suit in equity to secure its cancellation;[15] but in Orchard v. Alexander,[16] the supreme court of the United States, after reviewing all of its previous rulings on the subject, clearly indicated that until the patent issues the commissioner of the general land office and the secre-

44 L. ed. 1157; Risdon v. Davenport, 4 S. D. 555, 57 N. W. 482; Young v. Hanson, 95 Iowa, 717, 64 N. W. 654, 655; Drew v. Comisky, 22 L. D. 174; Castello v. Bonnie, 23 L. D. 162; Peyton v. Desmond, 129 Fed. 1, 9, 63 C. C. A. 651; United States v. Detroit Lumber Co., 200 U. S. 321, 338, 26 Sup. Ct. Rep. 282, 50 L. ed. 499.

[14] Caldwell v. Bush, 6 Wyo. 342, 45 Pac. 488, 489; Gourley v. Countryman, 18 Okl. 220, 90 Pac. 427, 431.

[15] Smith v. Ewing, 11 Saw. 56, 23 Fed. 741, 745; Wilson v. Fine, 14 Saw. 224, 40 Fed. 52, 54, 5 L. R. A. 141; Stimson v. Clarke, 45 Fed. 760, 761; American Mtg. Co. v. Hopper, 48 Fed. 47.

[16] 157 U. S. 372, 382, 15 Sup. Ct. Rep. 635, 39 L. ed. 737.

tary of the interior are clothed with plenary power over the acts of the subordinate officers of the land department, and nothing less than a gross abuse of this power will justify the courts in reviewing and annulling their acts.[17]

The mere suspension of an entry for the purpose of requiring compliance with departmental regulations, supplying supplemental proofs, or curing apparent defects, will not destroy the force of the certificate or enable third parties to attack its validity;[18] but if canceled, and such cancellation result from the rightful exercise of authority, the force and power of the certificate is destroyed.[19]

As to whether such cancellation is in the rightful exercise of such power is a matter concerning which the courts may inquire.[20]

[17] See, also, Parsons v. Venzke, 164 U. S. 89, 91, 17 Sup. Ct. Rep. 27, 41 L. ed. 360; Caldwell v. Bush, 6 Wyo. 342, 45 Pac. 488, 490; United States v. Steenerson, 50 Fed. 504, 509, 1 C. C. A. 552; Diller v. Hawley, 81 Fed. 651, 653, 26 C. C. A. 514; Hawley v. Diller, 178 U. S. 476, 488, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157; American Mortgage Co. v. Hopper, 64 Fed. 553, 556, 12 C. C. A. 293, 56 Fed. 67; Durango Land & Coal Co. v. Evans, 80 Fed. 425, 429, 430, 25 C. C. A. 523; California Redwood Co. v. Little, 79 Fed. 854, 857; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 34, 17 Sup. Ct. Rep. 225, 41 L. ed. 621; Knight v. United States L. Assn., 142 U. S. 161, 177, 12 Sup. Ct. Rep. 258, 35 L. ed. 974; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. Rep. 208, 42 L. ed. 591; Brown v. Hitchcock, 173 U. S. 473, 477, 19 Sup. Ct. Rep. 485, 43 L. ed. 772; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 11, 50 C. C. A. 79, 61 L. R. A. 230, 21 Morr. Min. Rep. 633; Parcher v. Gillen, 26 L. D. 34; Aspen Cons. M. Co. v. Williams, 27 L. D. 1; Mineral Farm Min. Co. v. Barrick, 33 Colo. 410, 80 Pac. 1055, 1056; Peyton v. Desmond, 129 Fed. 1, 8, 63 C. C. A. 651; United States v. Detroit Lumber Co., 200 U. S. 321, 338, 26 Sup. Ct. Rep. 282, 50 L. ed. 499.

[18] Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557, 561, 9 C. C. A. 613; Gurney v. Brown, 32 Colo. 472, 77 Pac. 357, 360; affirmed, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50 L. ed. 717, *sub nom.* Brown v. Gurney.

[19] Murray v. Polglase, 17 Mont. 455, 43 Pac. 505, 508.

[20] Orchard v. Alexander, *supra* (citing Johnson v. Towsley, 13 Wall.

Such cancellation would not of itself render the ground subject to relocation. The applicant would simply be relegated to such possessory rights as he had prior to the initiation of patent proceedings and such as he may have subsequently acquired.[21]

A relocation made after entry and prior to relinquishment or cancellation is void and would not become effectual upon such cancellation or relinquishment.[22] In case of relinquishment under threat of cancellation it becomes effectual when filed.[23] But of course the relinquishment as an evidence of abandonment must show the intention of surrendering the land to the government, that is, extinguishing location rights as well as rights under the patent application.[24]

Upon the question as to whether an order of cancellation takes effect as of the date made without re-

(U. S.) 72), 20 L. ed. 485; Parsons v. Venzke, 164 U. S. 89, 91, 17 Sup. Ct. Rep. 27, 41 L. ed. 360; United States v. Detroit L. Co., 200 U. S. 321, 338, 26 Sup. Ct. Rep. 282, 50 L. ed. 499; Southern Cross G. M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423, 424.

21 Clipper M. Co. v. Eli M. & L. Co., 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286, 288, 64 L. R. A. 209; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 951; Rebecca G. M. Co. v. Bryant, 31 Colo. 119, 102 Am. St. Rep. 17, 71 Pac. 1110, 1111, 22 Morr. Min. Rep. 538; Clipper M. Co. v. Eli M. Co., 33 L. D. 660; Peoria & Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 918; McGowan v. Alps Cons. M. Co., 23 L. D. 113; In re Magruder, 1 L. D. 526. See Floyd v. Montgomery, 26 L. D. 122; Draper v. Wells, 25 L. D. 550.

22 Brown v. Gurney, 201 U. S. 184, 191, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; Gurney v. Brown, 32 Colo. 472, 77 Pac. 357, 360. This is the rule supported by the weight of authority. Balleston v. Douglas M. Co., 20 Idaho, 760, 120 Pac. 827, 829. Prior decisions, such as Murray v. Polglase, 23 Mont. 401, 59 Pac. 439, 443, United States v. Steenerson, 50 Fed. 504, 507, 1 C. C. A. 552, and Adams v. Polglase, 32 L. D. 477, must give way to the rule announced in Brown v. Gurney, *supra*.

23 Brown v. Gurney, 201 U. S. 184, 192, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; Gurney v. Brown, 32 Colo. 472, 77 Pac. 357, 359.

24 Peoria & Colorado M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915, 918, distinguishing Gurney v. Brown, *supra*. See, also, Batterton v. Douglas M. Co., 20 Idaho, 760, 120 Pac. 827, 829.

gard to the time when it is noted of record in the local office, or from time of such notation, we find that the land department has not been altogether consistent in its rulings. At one time it held that it took effect only upon its transmission to and notation by the local officers.[25]

It subsequently changed this ruling and adopted the view that such order takes effect as of the date made, without regard to the time when it is noted of record in the local office,[26] and this ruling received the sanction of the circuit court of the eighth circuit district of Minnesota.[27]

The circuit court of appeals for the same circuit, however, condemned the later ruling on both principle and policy.[28]

Logically such an order should not take effect at least until the time for appeal or application for review has elapsed,[29] although there are decisions of the department holding to the contrary.[30]

The order of the secretary reversing such a judgment by the commissioner would, of course, reinstate the entry.

The latest decision of the secretary holds that so far as the rights of the entryman are concerned, a final

[25] See authorities referred to in Germania Iron Co. v. James, 89 Fed. 811, 816, 32 C. C. A. 348.

[26] Anderson v. N. P. R. R., 7 L. D. 163; Perrott v. Connick, 13 L. D. 598; Oettel v. Dufur, 22 L. D. 77.

[27] Germania Iron Co. v. James, 82 Fed. 807, 809.

[28] Germania Iron Co. v. James, 89 Fed. 811, 817, 32 C. C. A. 348. See Germania Iron Co. v. United States, 165 U. S. 379, 17 Sup. Ct. Rep. 337, 41 L. ed. 754.

[29] Guillory v. Buller, 24 L. D. 209; Cowles v. Huff, 24 L. D. 81. The rule in the latter case approved by the United States supreme court in Holt v. Murphy, 207 U. S. 407, 412, 28 Sup. Ct. Rep. 212, 52 L. ed. 271.

[30] In re Reed, 6 L. D. 563; Barclay v. State of California, 6 L. D. 699.

judgment of cancellation by the department is operative and effective from the moment of its rendition; but no application will be received nor any rights recognized as initiated by the tender of an application for the land embraced in such entry until the cancellation of the entry has been noted on the records of the local office.[31] The order for cancellation cannot be given retroactive effect to the detriment of the entryman.[32]

One who purchases from the holder of such certificate takes his title subject to the right of the department to cancel the entry for sufficient reasons.[33] It has been said by the secretary of the interior that the purchaser is entitled to no equitable consideration by reason of such purchase,[34] and that he has no greater or different right than the one from whom he purchased,[35] and is charged with notice of all defects in the title.[36]

In Hawley v. Diller,[37] a case arising under the timber and stone act, the supreme court of the United

[31] Young v. Peck, 32 L. D. 102. See, also, Holt v. Murphy, 207 U. S. 407, 28 Sup. Ct. Rep. 212, 52 L. ed. 271; McKnight v. El Paso Brick Co., 16 N. M. 721, 120 Pac. 694, 699; Batterton v. Douglas M. Co., 20 Idaho, 760, 120 Pac. 827, 829; Instructions, 40 L. D. 415.

[32] Southern Cross Gold M. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423, 424.

[33] Swigert v. Walker, 49 Kan. 100, 30 Pac. 162, 163; American Mortgage Co. v. Hopper, 56 Fed. 67, 75, 64 Fed. 553, 559, 12 C. C. A. 293; Diller v. Hawley, 81 Fed. 651, 655, 26 C. C. A. 514; Hawley v. Diller, 178 U. S. 476, 485, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157; California Redwood Co. v. Little, 79 Fed. 854, 856; Lusk v. Larned Mercantile R. E. Co., 7 Kan. App. 581, 52 Pac. 455.

[34] United States v. Miller, 14 L. D. 617, and departmental decisions cited in Hawley v. Diller, 178 U. S. 476, 485, 486, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157.

[35] Murphy v. Sanford, 11 L. D. 123.

[36] In re Kibling, 7 L. D. 327.

[37] 178 U. S. 476, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157.

States, construing the term "*bona fide* purchasers" as used in the act, approved the rule theretofore announced by Justice Miller in Root v. Shields,[38] to the effect that in order to establish the status of a *bona fide* purchaser so as to be entitled to the protection of chancery, a party must show that in his purchase and by the conveyance to him he acquired the legal title. A purchaser after an entry but prior to patent takes only an equity, and therefore is not a *bona fide* purchaser.

One of the syllabi in Hawley v. Diller is as follows:—

> An entryman under the act acquires only an equity, and a purchaser from him cannot be regarded as a *bona fide* purchaser within the meaning of the act of congress unless he become such after the government by issuing a patent has parted with the legal title.

In the later case of United States v. Detroit Lumber Company[39] the court repudiated this syllabus, stating that it was prepared by the reporter, and expressed *his* understanding of the decision, and that such understanding was incorrect; in other words, the headnote was a misinterpretation of the opinion.

In the Detroit Lumber Company case forty-four patents under the stone and timber act had been obtained by fraud, and suit was brought to vacate them; also for an accounting for timber cut on the lands prior to patent. The Detroit Lumber Company had cut the timber on all of the lands under contracts with transferees of the entrymen, and, after patent, purchased twenty-seven of the tracts. The court held that as to these the lumber company was a purchaser in good

[38] 1 Woolw. 340, 348, 363, Fed. Cas. No. 12,038.

[39] 200 U. S. 321, 337, 26 Sup. Ct. Rep. 282, 50 L. ed. 499.

faith, and that, under the doctrine of relation, its title became operative as of the dates of the entries. The patents to the remaining seventeen tracts were vacated for fraud, and the government not only recovered the land but retained the purchase price. The court held, however, that the government should not, in equity, be permitted also to recover from the Detroit Lumber Company the value of the timber cut under contracts made in good faith without notice of any defects in the title, saying:—

> A party who deals with such entryman—relying upon the evidences of his entry, which are in all respects in form good and sufficient, and are an acknowledgment by the Government officials of a rightful entry—is justly entitled to the consideration of a court of equity.[40]

In other words, one purchasing the equitable title may, under certain circumstances, be deemed in equity a *bona fide* purchaser.

Hawley v. Diller was an action to erect a trust on a patent, the party seeking relief claiming as a *bona fide* purchaser from an entryman, holding a certificate of entry procured by fraud—which had been canceled—and the land having been subsequently patented to another.

We think the rule stated in Hawley v. Diller is not necessarily in conflict with that stated in United States v. Detroit Lumber Company, and is the rule uniformly adhered to by the general land office.[41]

A transferee or mortgagee claiming under an entry, however, if his interest or claim is known to the land

[40] Id., 200 U. S. 321, 339, 26 Sup. Ct. Rep. 282, 50 L. ed. 499.

[41] So stated by the court in its opinion in Hawley v. Diller, *supra*.

department, is entitled to notice of any action by the government affecting the entry.[42]

On application for reinstatement of a canceled mineral entry, where it appears that parties are claiming adversely thereto, the applicant should publish notice of his application for a period of sixty days, in the same manner as a notice for an original application for patent is required to be published.[43]

**§ 773. The certificate of purchase as evidence—Collateral attack.**—Before the duplicate receipt or certificate may be introduced in evidence for any purpose, it is necessary to prove the genuineness of the signature of the land officer issuing it.[44]

The doctrine that courts take judicial notice of the genuineness of the signatures of executive officers only applies to the heads of departments and principal officers. We are aware of no case where the doctrine has been extended to any subordinate official connected with the administration of the land laws below that of an acting commissioner.[45]

For what purpose may the certificate be admitted in evidence? If it is equivalent to a patent, it should be accepted as evidence of title in actions brought by or prosecuted against third parties.

It has frequently been held by the supreme court of the United States that in the federal courts certificates of final entry issued by the officers of the land department are not sufficient to authorize a recovery in an

[42] Romance Lode Mining Claim, 31 L. D. 51; In re Babbitt, 35 L. D. 387.

[43] Kohnyo and Fortuna Lodes, 28 L. D. 451; Gaffney v. Turner, 29 L. D. 470.

[44] Jackson v. McMurray, 4 Colo. 76, 12 Morr. Min. Rep. 164, citing Fail v. Goodtitle, Breese (1 Ill.) 201.

[45] York Ry. Co. v. Winans, 17 How. (U. S.) 31, 40, 15 L. ed. 27.

action of ejectment, as the legal effect of such certificates is to convey only the equitable title.[46] This rule applies, notwithstanding the fact that the state wherein the action is brought has provided by its laws that recovery may be had in ejectment when the party claims by virtue of such a certificate.[47] It is to be noted, however, that the controversies in which these principles were announced arose out of entries for agricultural land, and not under the mining laws. The essential difference in the nature of the estate held by the owner of a perfected mining location and that held by an agricultural claimant has been fully explained in a preceding section.[48]

Under the mining laws, the tenure by which the estate of the miner is held possesses the attributes of a fee, as against everyone save the government. Ejectment may be maintained upon an unpatented mining title.[49] When perfected under the law, a mining location is held under a legal title as against everyone save the paramount proprietor,[50] and its owner is entitled to the most plenary and summary remedies cognizable in equity for quieting his claim against hostile attack.[51]

[46] Langdon v. Sherwood, 124 U. S. 74, 83, 8 Sup. Ct. Rep. 429, 31 L. ed. 344; Fenn v. Holme, 21 How. (U. S.) 481, 483, 16 L. ed. 198.

[47] Hooper v. Scheimer, 23 How. (U. S.) 235, 249, 16 L. ed. 452; Langdon v. Sherwood, 124 U. S. 74, 83, 8 Sup. Ct. Rep. 429, 31 L. ed. 344. The power of the state to enact this class of legislation is recognized, but they have no power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect. Bagnell v. Broderick, 13 Pet. (U. S.) 436, 450, 10 L. ed. 235. Cited in Tyee Cons. M. Co. v. Langsteat, 136 Fed. 124, 127, 69 C. C. A. 548.

[48] *Ante*, § 542.

[49] Davidson v. Calkins, 92 Fed. 230, 232.

[50] *Ante*, §§ 535, 539.

[51] Gillis v. Downey, 85 Fed. 483, 488, 29 C. C. A. 286; Dahl v. Raunheim, 132 U. S. 260, 262, 10 Sup. Ct. Rep. 74, 33 L. ed. 324, 16 Morr. Min. Rep. 214.

The certificate of purchase is evidence of the perfection of the right. It is evidence that all adverse claims which might have been asserted against the right of the purchaser have been waived or adjudicated in his favor. Adverse claimants have had their day in court.[52]

In addition to this, section nine hundred and ten of the Revised Statutes provides that,—

> No possessory action between persons in any court of the United States for the recovery of any mining title or for damages to any such title shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States.

Certificates of purchase issued to mining claimants are accepted by the federal courts as evidence of the right to maintain actions involving the ownership of the claim.[53]

So far as the state courts are concerned, this rule is accepted on principle,[54] although in most, if not all, of the states there is affirmative legislation, making the certificate primary evidence that the holder or his assignee is the owner of the land.[55]

The force of the certificate may be overcome by showing that in issuing it the land officers exceeded

[52] Neilson v. Champagne M. & M. Co., 111 Fed. 655, 656, 21 Morr. Min. Rep. 664.

[53] Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Saw. 355, 34 Fed. 515, 520, 15 Morr. Min. Rep. 581 (referred to in Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 432, 12 Sup. Ct. Rep. 877, 36 L. ed. 762, 17 Morr. Min. Rep. 488); Hamilton v. Southern Nev. G. & S. M. Co., 13 Saw. 113, 33 Fed. 562, 567, 15 Morr. Min. Rep. 314; Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540, 541, 18 Morr. Min. Rep. 113.

[54] Rader v. Allen, 27 Or. 344, 41 Pac. 154, 155; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308.

[55] Thompson v. Basler, 148 Cal. 646, 113 Am. St. Rep. 321, 84 Pac. 161.

their jurisdiction; and the test in such cases is whether the officers had the power to enter upon the inquiry, not whether their conclusion in the course of it was right.[56] The certificate is not subject to collateral attack.[57] It may be assailed only upon the same grounds and in the same manner as a patent may be assailed[58] —a subject to be fully presented in a succeeding section.[59]

[56] Bradley v. Dell's Lumber Co., 105 Wis. 245, 81 N. W. 394, 396, and cases cited. See, also, note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30.

[57] Brown v. Gurney, 201 U. S. 184, 193, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; Hamilton v. Southern Nev. G. & S. M. Co., 13 Saw. 113, 33 Fed. 562, 566, 15 Morr. Min. Rep. 314; Neilson v. Champagne M. & M. Co., 111 Fed. 655, 656, 21 Morr. Min. Rep. 664. See Murray v. Polglase, 23 Mont. 401, 59 Pac. 439, 445; Ballerton v. Douglas M. Co., 20 Idaho, 760, 120 Pac. 827, 829.

[58] Bash v. Cascade M. Co., 29 Wash. 60, 69 Pac. 402, 404.

[59] *Post*, § 777.

# CHAPTER VII.

## THE PATENT.


§ 777. General rules as to conclusiveness of patents.
§ 778. Conclusiveness of patent as to form and extent of surface boundaries.
§ 779. Character of the land established by the patent.
§ 780. What is conveyed by a lode patent.
§ 781. What is conveyed by a placer patent — Reservation of lodes "known to 'exist.'"
§ 782. Exceptions in junior patents of conflicting area held under senior title.
§ 783. Title conveyed by patent relates to inception of right — When evidence admissible to prove date of location.
§ 784. Patent — How vacated — Within what time suit must be brought.


**§ 777. General rules as to conclusiveness of patents.**—In presenting in the preceding chapters some of the questions arising out of the various phases of the federal mining laws, the force and effect of a land patent when issued has been necessarily, although incidentally, involved. We have there had occasion to enunciate some of the elementary principles which have guided the courts in determining the legal value of this instrument.

The land department is a *quasi* judicial tribunal, and a patent is the judgment of that tribunal upon the questions presented and a conveyance in the execution of that judgment.[1]

When it is attacked, two questions are presented. They are, Did the department have jurisdiction to issue the patent and to determine the questions

[1] As to the double aspect of a patent—i. e., as a judgment and a conveyance—see note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30.

which conditioned its issue? and, Was its judgment induced by fraud, mistake of fact, or error in law?[2]

With the issuance of the patent the functions of the land department terminate.[3] It is the culmination of the proceeding *in rem*[4]—the final judgment of the tribunal specially charged with passing the government title. With the title passes away all authority or control of the executive department over the land and over the title which it conveys.[5]

To the extent that we have already covered the field, it is unnecessary to do more than recapitulate the results heretofore reached as to the force and effect of this judgment.

(1) A patent for land is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles until set aside or annulled. It is not open to collateral attack;

(2) The land department is a tribunal appointed by congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else;[6]

(3) The government having issued a patent cannot, by the authority of its own officers, invalidate it by the issuing of a second one for the same property;

[2] United States v. Northern Pacific Ry., 95 Fed. 864, 869, 37 C. C. A. 290. See, also, King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29, where the principles are tersely stated and authorities cited.

[3] Steel v. St. Louis Smelting Co., 106 U. S. 447, 454, 1 Sup. Ct. Rep. 389, 27 L. ed. 226.

[4] *Ante*, § 713.

[5] Moore v. Robbins, 96 U. S. 530, 532, 24 L. ed. 848; Kirwan v. Murphy, 83 Fed. 275, 280, 28 C. C. A. 348; King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29; Peyton v. Desmond, 129 Fed. 1, 9, 63 C. C. A. 651.

[6] Leonard v. Lennox, 181 Fed. 760, 764, 104 C. C. A. 296.

(4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others;[7]

(5) A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken;[8]

[7] *Ante*, § 175.

[8] Davis v. Weibbold, 139 U. S. 507, 529, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; United States v. Iron S. M. Co., 128 U. S. 673, 685, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 640, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Creede & Cripple Creek M. & M. Co. v. Uinta Tunnel Co., 196 U. S. 337, 353, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Lawson v. United States M. Co., 207 U. S. 1, 28 Sup. Ct. Rep. 15, 52 L. ed. 65; Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513, 515; Kahn v. Old Tel. Co., 2 Utah, 174, 11 Morr. Min. Rep. 645; Chambers v. Jones, 17 Mont. 156, 42 Pac. 758, 759; Poire v. Wells, 6 Colo. 406; Justice M. Co. v. Lee, 17 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 444, 445, 18 Morr. Min. Rep. 220; Montana Cent. Ry. v. Migeon, 68 Fed. 811, 812; Harkrader v. Carroll, 76 Fed. 474, 476; Los Angeles v. Thompson, 117 Cal. 594, 601, 49 Pac. 714, 716; Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901, 903; Sharkey v. Candiani, 48 Or. 112, 7 L. R. A., N. S., 191, 85 Pac. 219; Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 586, 66 C. C. A. 299; Work Min. Co. v. Doctor Jack Pot M. Co., 194 Fed. 620, 624, 114 C. C. A. 392; Southern Development Co. v. Endersen, 200 Fed. 272. For an instance where the supreme court of Nevada seems to have overlooked the rule permitting a collateral attack on a patent issued on a forest lieu selection, see Tonopah Goldfield R. R. Co. v. Fellowbaum, 32 Nev. 278, 107 Pac. 882, 884. In Van Sice v. Ibex M. Co., 173 Fed. 895, 97 C. C. A. 587, a patent was issued to three original locators. Pending the proceedings in the land office and prior to the issuance of the patent, one of the co-owners, who was named as a patentee, was advertised out. The delinquent co-owner contended that the issuance of the patent in which he was named as one of the patentees was a conclusive determination of his ownership. The court held otherwise, and permitted the working co-owner to show the facts and establish his right to the forfeited interest.

(6) It is conclusive evidence of the citizenship and qualification of the patentee;[9] and,

(7) In cases of mining patents, that all matters which might have been the subject of an adverse claim have been conclusively adjudicated in favor of the patentee.[10]

Embraced within these general propositions we encounter certain subordinate or complementary rules, referable to one or the other of the general ones, where attention is directed to a particular fact, or series of facts, necessary to be passed upon in the patent proceeding, or which may be presumed to have been passed upon. We are not particularly interested in the investigation of any class of patents, save those issued in pursuance of the mining laws, and are not called upon to examine the special force and effect of such instruments as conveying the government title to lands agricultural in character, except in so far as clauses of reservation are lawfully inserted therein, excluding from their operation mines and mining claims.

These complementary rules may be considered in succeeding sections as we examine individual classes of patents falling within the purview of this treatise.

**§ 778. Conclusiveness of patent as to form and extent of surface boundaries.**—We have heretofore discussed the superficial extent which may be lawfully embraced in mining locations, both lode[11] and placer,[12]

[9] *Ante*, § 227.

[10] *Ante*, § 742; Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 82, 16 Pac. 513, 16 Morr. Min. Rep. 145; Round Mountain M. Co. v. Round Mountain Sphinx M. Co. (Nev.), 129 Pac. 308 (pending on rehearing).

[11] *Ante*, § 361.

[12] *Ante*, § 447.

and have noted that, while the law limits the area which an individual may embrace in a single location, there is no limitation to the number of locations he may purchase.[13] A patent may, therefore, embrace a greater area than that included in a single location, as the owner may include in his patent application as many contiguous locations as he may own.[14] It may thus appear upon the face of the patent that the area is greater than is allowed for an individual location. This does not render the patent void, nor cast upon the patentee the affirmative duty of showing that the patented surface is a composite of several locations. This fact will necessarily be presumed in support of the patent. As was said by the supreme court of the United States, in speaking of the functions of the land department:—

> Indeed, the doctrine as to the regularity and validity of its acts where it has jurisdiction, goes so far that, if under any circumstances under the existing law a patent will be held valid, it will be presumed that such circumstances existed.[15]

This doctrine was applied to a placer patent embracing an area in excess of that allowed to an association of individuals,[16] and was followed by the circuit court and the circuit court of appeals of the ninth circuit and applied to lode patents.[17]

[13] *Ante*, § 327.

[14] *Ante*, §§ 670, 672.

[15] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 11 Morr. Min. Rep. 673.

[16] See, also, Tucker v. Masser, 113 U. S. 203, 204, 5 Sup. Ct. Rep. 420, 28 L. ed. 979.

[17] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 600; S. C., on appeal, 83 Fed. 658, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; Peabody Gold Mining Co. v. Gold Hill M. Co., 97 Fed. 657, 660; S. C., on appeal, 111 Fed. 817, 820, 49 C. C. A. 637, 21 Morr. Min. Rep. 591. See the discussion in a previous section of the Lakin-Dolly cases (§ 604, p. 1435), which case was invoked in an attempt to qualify this doctrine.

It may be announced as a general rule that a patent is conclusive evidence as to the limits of a location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent.[18]

Nor are the proceedings on which its issuance was based admissible in evidence to impeach or vary it.[19]

This rule is, of course, subject to the qualifications that where there is a variance between the calls of the patent for courses and distance and the monuments specified therein the monuments control,[20] where the monuments are clearly ascertained[21] or established by a fair preponderance of evidence.[22]

In retracing lines of a survey, the beginning point of a survey does not control more than any other point actually well ascertained.[23]

In determining what passes under a patent, the reference in the patents to the official plat and field-notes of the survey make the plat and field-notes a part

[18] Waterloo M. Co. v. Doe, 56 Fed. 685, 687, 17 Morr. Min. Rep. 586; S. C., 82 Fed. 45, 27 C. C. A. 50, 19 Morr. Min. Rep. 1; Golden Reward M. Co. v. Buxton Min. Co, 79 Fed. 868, 874.

[19] Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 859; Resurrection Gold M. Co. v. Fortune G. M. Co., 129 Fed. 668, 688, 64 C. C. A. 180.

[20] Los Angeles Farming & Milling Co. v. Thompson, 117 Cal. 594, 49 Pac. 714, 716; Garrard v. Silver Peak Mines, 82 Fed. 578, 585; S. C., on appeal, 94 Fed. 983, 36 C. C. A. 603; Meyer-Clarke-Rowe Mines Co. v. Steinfeld, 9 Ariz. 245, 80 Pac. 400, 401; Sinnott v. Jewett, 33 L. D. 91; Drogheda & West Monroe Extension Claims, 33 L. D. 183.

[21] Thallman v. Thomas, 102 Fed. 935, 936; Christenson v. Simmons, 47 Or. 184, 82 Pac. 805, 808; Lillis v. Urrutia, 9 Cal. App. 577, 99 Pac. 992, 993.

[22] Resurrection Gold M. Co. v. Fortune Gold M. Co., 129 Fed. 668, 672, 64 C. C. A. 180.

[23] Ayers v. Watson, 137 U. S. 584, 590, 10 Sup. Ct. Rep. 116, 33 L. ed. 803; Montana M. Co. v. St. Louis M. & M. Co., 183 Fed. 51, 64, 105 C. C. A. 343.

of the description of the land granted as fully as if they were incorporated in the patents.[24]

**§ 779. Character of the land established by the patent.**—It has been frequently determined that the patent is conclusive evidence of the character of the land. If the instrument was issued pursuant to the laws governing agricultural lands, the land embraced therein will be conclusively presumed to be agricultural, and if under the mining laws, to be mineral.[25]

We have heretofore alluded to patents issued to agricultural claimants under the pre-emption and homestead laws, and have observed[26] that these laws provided that no lands on which are situated any known salines or mines should be liable to entry. When a patent issues to the agricultural claimant, it would seem to be a conclusive adjudication that the

[24] Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294, 298.

[25] Garrard v. Silver Peak Mines, 82 Fed. 578, 588; Scott v. Lockey Inv. Co., 60 Fed. 34, 36; United States v. Budd, 144 U. S. 154, 167, 12 Sup. Ct. Rep. 575, 36 L. ed. 384, 388; United States v. Mackintosh, 85 Fed. 333, 336, 29 C. C. A. 176; Shaw v. Kellogg, 170 U. S. 312, 340, 18 Sup. Ct. Rep. 632, 42 L. ed. 1050; Northern Pacific Railway v. Soderberg, 86 Fed. 49, 50; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185, 187; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449, 451; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 44; S. C., on appeal, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, 21 Morr. Min. Rep. 633; Burfenning v. Chicago-St. Paul M. & O. Ry. Co., 163 U. S. 321, 323, 16 Sup. Ct. Rep. 1018, 41 L. ed. 175; Standard Quicksilver M. Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113, 114; Gertgens v. O'Connor, 191 U. S. 237, 240, 24 Sup. Ct. Rep. 94, 48 L. ed. 163; Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466, 467; Patterson v. Ogden, 141 Cal. 43, 99 Am. St. Rep. 31, 74 Pac. 443; Trephagen v. Kirk, 30 Mont. 562, 77 Pac. 58, 60; Jameson v. James, 155 Cal. 275, 100 Pac. 700; Morrow v. Warner Valley Stock Co., 56 Or. 312, 101 Pac. 171, 175; Southern Development Co. v. Endersen, 200 Fed. 272; Saunders v. La Purisima G. M. Co., 125 Cal. 159, 57 Pac. 656, 658, 20 Morr. Min. Rep. 93, applying doctrine to state patents. See, also, note 15, page 309, § 161, *ante*.

[26] § 209.

lands were agricultural, contained no known mines, and the patent is immune from collateral attack. In other words, agricultural patents fall within the general rule above stated.[27]

There is some confusion of judicial thought as to whether or not placer, railroad and townsite patents constitute exceptions to the general rule as to conclusiveness of patents.

We think that the controversies arising out of this class of patents involve rather the determination of what was intended by the law to be excepted out of the patent, than the question of its conclusiveness. It is quite difficult to reconcile the cases on this subject.

The present state of adjudicated law as to each class of patents may be found where the laws under which they are issued are dealt with in this treatise.

The construction of reservations of "known lodes"

[27] Jameson v. Jameson, 155 Cal. 275, 100 Pac. 700, 701; Paterson v. Ogden, 141 Cal. 43, 99 Am. St. Rep. 31, 74 Pac. 443. The supreme court of Arizona in Kansas City M. & M. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9, held that an agricultural patent might be impeached in an action at law by showing that at the time of the entry there were known mines on the land. In the later case of Old Dominion Copper Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333, 335, the court held that where it was shown that the character of the land was a subject of contest and investigation before the land department, the patent was conclusive, and not subject to collateral attack. We think the ruling in the earlier case is against the weight of authority. The decision in the later case permitting mineral claimants to attack a patent if there was no actual contest in the land department and denying that right when the question of the character of the land was actually tried and determined is illogical. The court lays down the rule in effect that litigants may go behind the patent for the purpose of showing what happened or did not happen in the general land office. By the great weight of authority the action of the land department is conclusive evidence that that tribunal performed its duty under the law, and determined the character of the land. The only way for a mineral claimant to secure relief is by direct attack on the patent.

in the placer laws and in patents issued thereunder will be discussed in a subsequent section.[28]

We have heretofore discussed the effect of patents to railroads[29] and to townsites.[30] Further comment as to these classes of patents is not necessary.

**§ 780. What is conveyed by a lode patent.**—A lode patent conveys:—

(1) The exclusive right of possession and enjoyment of all the surface included within the limits of the location,[31] as described in the patent, subject only to pre-existing easements;[32]

(2) All veins, lodes, and ledges throughout their entire depth, the tops, or apices, of which lie within the boundaries,[33] the right to pursue the vein in depth outside of such boundaries being limited, however, to cases where the lines of the location and the physical conditions with respect to the lode are such as are outlined in the chapter on extralateral rights;[34]

(3) *Prima facie,* such a patent confers the right to everything found within vertical planes drawn through

[28] *Post,* § 781.

[29] *Ante,* § 161.

[30] *Ante,* § 175.

[31] Rev. Stats., § 2322; 17 Stats. 91; Comp. Stats. 1901, p. 1425; 5 Fed. Stats. Ann. 13; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 229, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[32] *Ante,* § 729.

[33] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 70, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 611, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; S. C., on writ of error, 182 U. S. 499, 508, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200, 21 Morr. Min. Rep. 381. For distinction between lode and placer patents in this regard, see Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 229, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[34] *Ante,* §§ 581–594.

the surface boundaries; but these boundaries may be invaded by an outside lode locator holding the apex of a vein under a regular valid location, in the pursuit of his vein on its downward course underneath the patented surface. How the *prima facie* presumption may be overcome, and on whom rests the burden of proof, will be discussed when dealing with the action of trespass and the rules of evidence applicable to such action.[35]

It was at one time required by the land department that the applicant in the patent proceeding should state in his published and posted notices the length of the located lode which he claims.[36] The surveyor surveys a lode line, describes it in his field-notes, and frequently delineates it on his plat, and the patent grants the surface ground as surveyed, and so many linear feet of the vein.

As under the existing law, the appropriation of the vein is accomplished by locating a surface including it, the locator can obtain no more in length than is included within the limits of the surface boundaries, and the mere call in the survey and patent for so many feet of the lode is of no moment. If a patentee is granted fifteen hundred linear feet on a vein, he will obtain that much, if so much is found within his surface boundaries. If there is less, if the vein does not traverse the full length of his claim, but passes out of a side-line, the patentee may not follow it outside of these boundaries on the strike. There is no reason for perpetuating the early theories followed by the land department as to lode patents under the act of 1866.[37] There is no necessity for inserting in the

[35] *Post*, § 866.

[36] This is no longer required.

[37] *Ante*, § 59.

patent the number of linear feet granted. The patent is certainly not conclusive evidence of the physical existence of a lode to any continuous extent. The issuance of a lode patent conclusively presumes the existence within its boundaries of an apex,[38] as this is a fact necessary to support its validity, but it will not be presumed that this apex takes any particular direction or extends for any definite length.[39] The course of the lode as indicated by the hypothetical lode line exhibited by the surveyor concludes no one.[40]

The patent will only convey so much of the lode as has its apex within the boundaries, and the call for length in the patent is useless.[41]

In another section of this treatise, in dealing with the subject of burden of proof in actions of trespass,[42] we have expressed the view that where an outside apex proprietor seeks to justify his presence underneath the surface of another's property, the burden is upon him to establish his rights by a preponderance of evidence. In other words, he is called upon to prove that within the boundaries of his claim there is an apex of a vein traversing the claim in such a direction as to permit the exercise of an extralateral right in accordance with the rules heretofore discussed.[43] In other words, to quote from Judge Hawley's opin-

[38] Iron S. M. Co. v. Campbell, 17 Colo. 267, 272, 29 Pac. 513, 514.

[39] Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 668; appeal dismissed, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

[40] Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 18 Morr. Min. Rep. 113.

[41] Montana Ore Purchasing Co. v. Boston & Montana M. C. C. & S. M. Co., 20 Mont. 336, 51 Pac. 159, 160, 19 Morr. Min. Rep. 186; State v. District Court, 25 Mont. 505, 572, 65 Pac. 1020, 1023; Lellie Lode Min. Claim, 31 L. D. 21.

[42] *Post*, § 866.

[43] *Ante*, Title 6, ch. 3, § 564 et seq.

ion in the Consolidated Wyoming Mining Co. v. Champion Mining Co.:[44]—

> Hands off of any and everything within my surface lines, extending downward vertically until you prove you are working upon and following a vein which has its apex within your surface claims.

We have always been of the opinion, and we think it supported by the weight of authority, that in justifying his presence underneath foreign territory the apex claimant is not aided by any presumptions of fact flowing from the patent with regard to the position of the apex and its course through the claim; that the conclusive presumption as to the validity of the patent is confined to the surface area and its vertical bounding planes, that is, to its intralimital rights, which are subject to a right of invasion only by an outside apex proprietor—a right reserved by law and expressed in the patent. In other words, a lode patent does not raise any presumption in justification of the invasion of another's territory, as to the position of the apex or the course of the vein, but these facts, when challenged by the proprietor of the invaded claim, should be proved by the apex claimant, regardless of presumptions flowing from the patent. The circuit court of appeals of the eighth circuit, in the case of Work Mining and Milling Company v. Doctor Jack Pot Mining Co.,[45] challenges this view, and is sponsor for a doctrine which gives presumptive effect to the patent as to the existence of these basic facts. The case in which this doctrine was announced is an important one, and deserves careful consideration. We herewith reproduce figure 82D, which will be resorted to for purposes of discussion.

[44] 63 Fed. 540, 550, 18 Morr. Min. Rep. 113.

[45] 194 Fed. 620, 114 C. C. A. 392.

The Little Clara owned by the Work Mining company was a prior patented claim. The Lucky Corner owned by the Dr. Jack Pot company was located in the form indicated by the dotted lines. Patent was issued describing the dotted area and excepting conflicts with

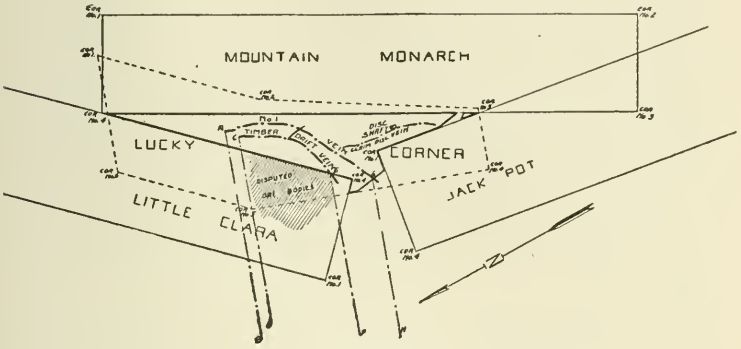



FIGURE 82D.

prior claims—the net patented surface being indicated by the irregular shape marked with the heavy black line. The controversy arose over ore bodies underneath the Little Clara surface, which pertained to two so-called secondary veins apexing in the Lucky Corner, known as Number One and Timber Drift veins. The action was ejectment by the Doctor Jack Pot company to recover possession of the segments of the so-called secondary veins underneath the Little Clara.

With the discovery vein in position as indicated on figure 82D passing through the discovery shaft, the rule defining extralateral rights on secondary veins by application of the planes of the discovery vein was invoked, a subject fully discussed in previous sections of this treatise.[46]

The answer of the Little Clara admitted the apex of each of these secondary veins to be within the sur-

[46] *Ante*, §§ 593, 594.

face lines of the Lucky Corner claim, but asserted that such apices on their course crossed two opposite nonparallel side-lines, and also urged that as a matter of fact there was no discovery vein on the Lucky Corner claim.

In its rulings on demurrer, on motion to strike out parts of defendant's defenses, on motion of defendant for judgment at the close of plaintiff's case, and also upon instructions requested and denied, the trial court held in effect that defendant could not show, as a matter of defense, that the Lucky Corner claim was located and patented without a discovery in fact, though the court permitted the defendant to present evidence on that point.

The plaintiff introduced its patent, showing parallel end-lines; proved the existence of the apices of the two secondary veins; located the points where such veins departed from the boundary lines of the Lucky Corner claim; established their continuity on the dip into the Little Clara claim, and located the ore bodies in question in Little Clara territory; proved that the subsidiary or secondary veins were not in the discovery shaft of the Lucky Corner, and rested its case without proving the apex or course of the discovery vein.

In its instructions, the court practically took from the jury the issue as to the nonexistence of the discovery vein, and charged the jury that the burden was on the defendant to prove that the discovery vein—which the court held was conclusively presumed by the issuance of the patent to be in the discovery shaft—crossed the side-lines, instead of the lines claimed by the locator as end-lines, and that, failing in this, the end-lines as described in the patent must be taken as the true end-lines of the claim, and controlled the extra-

lateral rights on the secondary veins. The jury found for the plaintiff.

The circuit court of appeals sustained the action of the trial court, holding that

> the fact that a discovery vein existed in the discovery cut must, for the purposes of this case, be conclusively presumed, and that *prima facie* at least the end-lines of the claim as fixed in the patent are the true end-lines, and, in the absence of evidence showing that the discovery vein instead of running lengthwise of the claim in fact crosses opposite side-lines of the claim, the end-lines as fixed by the patent must prevail; and this for the reason that the claim being longer than it is wide, it is entirely fair to assume that the locator will take all of the length of the vein he can.[47]

The court lays some stress on the Colorado laws, which provide that the locator must, as an act of location, sink a discovery shaft showing a well-defined crevice, and that when patent issues, it must be conclusively presumed that such shaft was sunk and the necessary disclosure made. The only privilege allowed, therefore, to a claim owner whose territory is invaded is to show that the vein in the discovery cut crosses the side lines, instead of the lines located as end-lines. If there is in fact no discovery vein, defendant's hands are tied, for there is nothing to prove.

The court of appeals determined in effect that the patent when issued is not only presumptive evidence of the antecedent compliance with the requirements of the federal mining laws, but it is also presumptive evidence that all the location acts required by the state laws to have been performed had been performed. The state law of Colorado requires the sinking of a discovery shaft, which must disclose the crevice or

[47] Id., 194 Fed. 620, 629, 114 C. C. A. 392.

vein. Therefore, patent having been issued, such vein must be conclusively presumed to exist in the shaft. If this be the correct rule, it follows that the force of a federal patent issued for a lode claim in a state having a discovery shaft law is much more potential than the same kind of a patent would be in a state having no such law, e. g., California and Utah. In other words, the California and Utah apex claimant must prove the situs and course of his apex when his rights are challenged by an outside proprietor whose territory is invaded, while in Colorado and other states similarly situated the burden shifts to the latter to show that the apex of the vein crosses the side lines, and this is the only defense available to him.

The fact that the force of a federal patent issued under the mining laws is to be determined to any extent by the provisions of state laws, enacted subsequent to the federal statutes,[48] seems to us an anomaly. These state laws are frequently changed, so that the patent may be presumptive evidence of a fact to-day, and to-morrow, by a repeal of the law, it may not carry any such presumption as to a patent subsequently issued.

It may be pertinent to remark that the laws of Colorado do not require that the apex of a vein should be exposed in the discovery shaft. A discovery on the dip of a vein suffices to support a location[49] if within the limits of the claim as located. The state laws require that the notice of the location posted and recorded must contain the date of location. It might be said with propriety that if the patent is presumptive evidence of the existence of a vein in the discovery shaft, it is also evidence of the date of location, neither

[48] The Colorado discovery shaft law was first enacted in 1874.

[49] *Ante*, § 337.

of these facts being recited in the patent. We know that the date of a location can be challenged after the issuance of a patent when a question of priority is involved.[50]

State legislation supplementing the federal mining laws is undoubtedly permissive, but it must be remembered that the purpose of these laws to the extent that they exceed the requirements of the federal statutes deal exclusively with the subject of locations, and do not purport to in any way provide for conditions under which patents may issue.

Another suggestion which we think quite pertinent finds expression in the decision of the supreme court of Utah, in the case of Grand Central Mining Company v. Mammoth Mining Company.[51]

> What may constitute a sufficient discovery to warrant a location of a claim may be wholly inadequate to justify the locator in claiming or exercising any rights reserved by the statutes. What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches a statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner.

Where there is no opportunity or necessity for adversing, an application for patent proceeds *ex parte*, and the declarations of the applicant are essentially self-serving.

The court of appeals, in the Work-Doctor Jack Pot case,[52] quotes in support of its ruling an excerpt from the opinion of the supreme court of the United States

[50] *Post*, § 783.

[51] 29 Utah, 490, 83 Pac. 648, 677. Appeal dismissed, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

[52] Id., 194 Fed. 620, 626, 114 C. C. A. 392.

in Enterprise Mining Company v. Rico-Aspen Mining Company:[53]—

> The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located.

In this case a patent had been granted for a mining claim lying parallel with the line of a discovery tunnel. It was contended that the tunnel locator should have adversed the patent application, in order to have secured the right to veins discovered in the tunnel which crossed the patented claim, the inception of the tunnel right being prior in time. In using the above-quoted language the court undoubtedly referred to a natural rather than a legal presumption. In any event, the case is not authority for the rule that such a presumption, if a legal one, is conclusive.

The supreme court of Idaho conceives the rule to be that in the absence of proof as to the course of the discovery vein the presumption arises that it crosses the end-lines as patented.[53a]

In the Work-Doctor Jack Pot case, the Little Clara having gone to patent was not called upon to adverse the junior application, and this for three reasons: First, where a patent has once been issued, purporting to convey a given tract of land in its entirety, the patentee has a right to rest upon its sufficiency and validity;[54] second, the subsequent application for patent of the Lucky Corner in terms excluded all conflict with the Little Clara; and, third, underground rights are never the subject of adverse claims.[55]

The circuit court of appeals recognized this, but suggested that the owners of the Little Clara might have

[53] 167 U. S. 108, 115, 17 Sup. Ct. Rep. 762, 42 L. ed. 96.

[53a] Stewart M. Co. v. Ontario M. Co. (Idaho), 132 Pac. 787, 793.

[54] *Ante*, § 718.

[55] *Ante*, § 730.

protested against the issuance of the patent. Upon what knowledge or information could this protest be based? The owners of the Little Clara are not presumed to have had access to the territory applied for by the Lucky Corner, nor to have known whether or not a discovery had been made therein. An attempt to investigate conditions shown in the workings of the Lucky Corner without consent would be clearly a trespass.

Again, to place the duty of making a protest upon every claim owner whose premises may be invaded at some subsequent time—perhaps many years later, when extensive development work has disclosed unthought-of geological conditions—is not only impracticable but unconscionable. For instance, in the vicinity of the Bunker-Hill mines at Wardner, Idaho, the underground rights of mining claims have been affected by the extralateral sweep of a vein apexing more than a mile distant.

The decision of the circuit court of appeals in the case under discussion appears to us to be out of harmony with the reasoning of the same court in the case of Uinta Tunnel Mining and Transportation Company v. Creede and Cripple Creek Mining and Milling Company,[56] with reference to adjudications of the land department which are *res inter alios acta.*

For administrative purposes the land department necessarily assumes that the course of the vein is lengthwise of the claim,[57] but this does not signify that when the patent once issues there is a presumption that such is the fact. If the doctrine of the circuit court of appeals in the case under consideration should be applied to the flat deposits found in Leadville, or

[56] 119 Fed. 164.
[57] *Ante,* § 366.

in the Black Hills of South Dakota,[58] or to the copper sulphide zones of Nevada and Arizona, or in the phosphate regions of Idaho and Wyoming,[59] all of which must be patented under the lode laws, as the deposits are essentially in place, the production of a patent presuming an apex extending lengthwise of the claim would take the entire sweep of the deposit, since it would be impossible for the defendant to prove that the vein crossed the side-lines of plaintiff's claim.

If the rule established by the circuit court of appeals had been applied in the epoch-making litigation which arose over the blanket deposits at Leadville, discussed and illustrated in a previous section of this treatise,[60] the mining map of that region as well as a judicial mining history would have been very different.

All of the states above named have discovery shaft laws.

It seems to the author that the rational solution of the difficulty is not to consider the rule, which requires an apex claimant to justify his presence in foreign territory by showing the position and course of his apex, as an attack on the patent, but rather an inquiry as to what was granted by the patent outside of its vertical boundaries.

In support of the validity of the patent as it affects and conveys intralimital rights, such patent may be given conclusive effect. But when attempts are made to assert rights which are extralateral, the exercise of which must be predicated on the existence of physical facts, rather than presumptions, it would seem the party asserting the extralateral rights should be compelled to prove the facts.

[58] See Homestead M. Co., 29 L. D. 689.

[59] See discussion at the end of § 583, *ante*.

[60] *Ante*, § 311.

In the Dr. Jack Pot case, the placing of the burden of proof as to the course and direction of the apex of the Lucky Corner discovery vein upon the owner of the Little Clara, the invaded territory, would appear in disregard of the presumptions flowing from the issuance of a patent for the latter claim.

With the highest respect for the opinion of the eighth circuit court of appeals, we feel that its opinion in the Work-Doctor Jack Pot case asserts a doctrine that will not receive the sanction of the supreme court of the United States.

**§ 781. What is conveyed by a placer patent—Reservation of lodes "known to exist."**—In discussing the proceedings by which a placer patent may be obtained, we had occasion to refer to the law which excepted from the operation of such patent all lodes whose existence was known at the time the placer application was filed and which were not claimed by the placer applicant.[61]

The form of placer patent now issued by the department contains the following clauses:—

> *First*—That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on the —— (date of filing of the placer patent application).[62]

[61] *Ante*, § 413.

[62] Formerly the following clauses were inserted:

"*First*—That the grant is restricted in its exterior limits to the boundaries of the tract described and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, tin, copper, or other valuable deposits, which may hereafter be discovered within said limits and which

*Second*—That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, *be claimed,* or known to exist within the above-described premises at said last-named date, the same is expressly excepted and excluded from these presents.

*Third*—That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein or lode, should the same, or any part thereof, be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted.

By eliminating from the second clause the words "claimed or," which are unauthorized, the restrictions fairly express the intent of the law.

When is a lode "known to exist" within the meaning of the statute, so as to be excepted from the operation of the placer patent?

To whom must its existence be known? The supreme court of the United States has enabled us to answer these questions without serious difficulty.

are not *claimed* or known to exist at the date thereof—i. e., the date of the patent."

The supreme court of the United States expressed the view that this clause gave expression to the intent of the statute (Reynolds v. Iron S. M. Co., 116 U. S. 687, 697, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591); but subsequently held that the terms were broader than the language of the statute. The insertion of the word *"claimed"* was unauthorized. Iron S. M. Co. v. Reynolds, 124 U. S. 374, 382, 8 Sup. Ct. Rep. 598, 31 L. ed. 466; United States v. Iron S. M. Co., 128 U. S. 673, 680, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; Cripple Creek G. M. Co. v. Mt. Rosa M., M. & L. Co., 26 L. D. 622. See, also, Discovery Placer, 25 L. D. 460.

The restriction was unauthorized in another particular: It fixed the period as the date of the patent, instead of the date of filing the application. Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 402, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

Where a location of a vein or lode has been made under the law and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, it may be safely said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent to a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode;[63] but a valid lode location can only be predicated on a discovery of a vein of quartz or other rock in place carrying valuable deposits sufficient to justify the expenditure of time and money for its development,[64] and such discovery must be shown before the location notice or its record will possess any force as against a placer patent.[65]

While the land department has jurisdiction to issue a patent for a lode previously known to exist within the limits of a tract patented as a placer,[66] the knowledge of the existence of such lode is not presumed from the mere production of a recorded location notice antedating the location of the placer.[67]

A placer patent does not exclude territory covered by an existing lode location of a date prior to the placer location where the lode or vein itself upon

[63] Noyes v. Mantle, 127 U. S. 348, 354, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168, 15 Morr. Min. Rep. 611.

[64] *Ante*, § 336.

[65] Migeon v. Montana Cent. Ry., 77 Fed. 249, 254, 23 C. C. A. 156, 18 Morr. Min. Rep. 446; McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419, 420; Discovery Placer Claim v. Murray, 25 L. D. 460; Northern P. R. R. v. Allen, 27 L. D. 286; In re Bourquin, 27 L. D. 289.

[66] §§ 413, 704.

[67] Wilson Creek Cons. M. & M. Co. v. Montgomery, 23 L. D. 476; Valley Lode, 22 L. D. 317; S. C., on review, 22 L. D. 713.

which such prior location is predicated does not lie within the boundaries of the placer.[68]

A lode location subsequent to and in conflict with a placer location, but made prior to the application for placer patent, does not, when based alone on a discovery outside the limits of the placer claim and at one side thereof only, establish the fact that the lode or vein thus claimed was known to exist within the boundaries of the placer at the date of the application for patent therefor.[69]

Even where a patent has been issued for a lode claim within the limits of a prior patented placer, it will not be presumed from the mere production of the lode patent that the lode was known to exist at the time of filing the application for placer patent.[70]

As the prior placer patentee is not called upon to adverse the lode application,[71] he is not concluded by the lode patent, and the question of priority must be determined by reference to the antecedent facts.[72] The question will be decided according to the doctrine of relation discussed in a subsequent section.[73]

[68] Wilson Creek M. & M. Co. v. Independence T. & M. Co., 1 Colo. Dec. Supp. 1.

[69] Cripple Creek G. M. Co. v. Mt. Rosa M., M. & L. Co., 26 L. D. 622. See North Star Lode, 28 L. D. 41.

[70] Iron S. M. Co. v. Campbell, 135 U. S. 286, 293, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

[71] Discovery Placer v. Murray, 25 L. D. 460; *ante*, § 718.

[72] Where upon the contest of application for a lode patent within the limits of a prior patented placer the land department finds against the lode claimant, the courts treat this as conclusive against the lode claimant in all subsequent judicial proceedings. Griffin v. American Gold Min. Co., 114 Fed. 887, 891, 52 C. C. A. 507.

If this be true, why should not the action of the land department in issuing a patent to such lode claimant be equally conclusive that the "known lode" existed? That it is not true is manifest from the decision of the supreme court of the United States, in Iron S. M. Co. v. Campbell, *supra*.

[73] *Post*, § 783.

Where the lode was located subsequent to the filing of the placer application, based upon an assertion that its existence was known at the time of such filing, the party seeking to establish that it is within the exception of the placer patent must bring himself clearly within the rule enunciated by the supreme court of the United States, viz., that in order to meet the designation of "known vein," such vein or lode must have been, at the date of the placer application, clearly ascertained and known to be of such extent as to render the land more valuable on that account, and justify its exploitation;[74] and its existence and quality must have been known to the applicant for the placer patent or known to the community generally,—from which knowledge by the applicant might be inferred,—or else disclosed by workings, and obvious to anyone making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government.[75]

Mere outcroppings or other indications of a vein within the limits of a placer or evidence of the exist-

[74] Iron S. M. Co. v. Reynolds, 124 U. S. 374, 382, 8 Sup. Ct. Rep. 598, 31 L. ed. 466; Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 404, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436; Sullivan v. Iron S. M. Co., 143 U. S. 431, 441, 12 Sup Ct. Rep. 555, 36 L. ed. 214; Montana Cent. Ry. v. Migeon, 68 Fed. 811, 813; S. C., on appeal, 77 Fed. 249, 23 C. C. A. 156, 18 Morr. Min. Rep. 446; Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461, 462; Casey v. Thieviege, 19 Mont. 341, 61 Am. St. Rep. 511, 48 Pac. 394, 396; Adams v. Quijada, 25 L. D. 24, citing United States v. Iron S. M. Co., 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; McConaghy v. Doyle, 32 Colo. 32, 75 Pac. 419, 420; Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85, 88; Kift v. Mason, 42 Mont. 232, 112 Pac. 392, 394. But see Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, 846.

[75] Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 402, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436; Washoe Copper Co. v. Junita, 43 Mont. 178, 115 Pac. 917, 918; 1 Water & Min. Cas. 451; Discovery Placer v. Murray, 25 L. D. 460; *ante*, § 718.

ence of a vein which might be sufficient to support a lode location as against a conflicting lode claim, or sustain a lode location as against a subsequent placer location in an adverse proceeding, are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer claim prior in point of time and which has been patented.[76]

Before it can be said that a lode is "known to exist" there must be actual knowledge, as distinguished from supposition or surmise.[77]

Evidence for the purpose of establishing these facts may be admitted, not as an impeachment of the placer patent, but to establish that the lode was reserved and did not pass by such patent.[78]

The burden of proving the existence of a "known lode" rests with the lode claimant.[79]

No particular stress is laid upon the mere form in which these exceptions are stated in the patent. Unless they are within the sanction of the law they are

[76] McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419, 421; Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85, 88. The decision of the supreme court of Montana in Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, 847, seems to sanction a more liberal rule, i. e., that a vein which would support a location in the public domain is, when known to exist as a clearly ascertained vein, such a vein as is excepted from the operation of the placer patent. The court in this case takes the position that the analogies of agricultural and townsite patents are not to be followed in controversies between lode locations and placer patentees.

[77] Clipper Min. Co. v. Eli M. & L. Co., 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286, 288, 64 L. R. A. 209; S. C., in error, 194 U. S. 220, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[78] Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 402, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436. For general discussion of the location of lodes within placers, consult §§ 413, 415.

[79] Cripple Creek G. M. Co. v. Mt. Rosa M. & M. Co., 26 L. D. 622; Montana Cent. Ry. v. Migeon, 68 Fed. 811, 816; McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419, 420; Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, 847; Kift v. Mason, 42 Mont. 232, 112 Pac. 392, 394.

void.[80] The reservations would be implied in the absence of these excepting clauses.

The rights of the owners of lodes having their apices outside of the limits of the placer patent to pursue their veins underneath the surface of the placer claims, a reservation intended to be expressed in the third clause, is a subject fully discussed in a preceding section, and we need not repeat what is there stated.[81]

We may conclude that a placer patent conveys to the patentee everything within vertical planes drawn downward through the surface boundaries, except (1) such lodes or veins whose tops, or apices, are within the placer limits, whose existence was known prior to the filing of the application for placer patent, and were not included in the placer application; (2) such segments of veins having their tops or apices elsewhere, as may underlie the placer surface, and which may lawfully be taken by the apex lode locator under a regular valid lode location, pursuing his vein on its downward course. In the last class of cases the question of priority of location is wholly unimportant.[82]

**§ 782. Exceptions in junior patents of conflicting area held under senior title.**—We have already observed that the courts to a limited degree, and the land department to a practically unlimited one, have sanctioned the making of junior mining locations over, across, and upon prior patented and unpatented lands both mining and agricultural.[83]

[80] *Ante*, § 171.

[81] *Ante*, § 611.

[82] *Ante*, § 611. See Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 229, 24 Sup. Ct. Rep. 632, 48 L. ed. 944; Washoe Copper Co. v. Junila, 43 Mont. 178, 115 Pac. 917, 918; 1 Water & Min. Cas. 451.

[83] *Ante*, §§ 363, 363a, 448b.

This necessarily requires the insertion in the patent for the junior claim of proper clauses of exception or reservation of the conflict surface area. What actually passes by such a patent must be necessarily ascertained by a process of subtraction. The net result will be reached by the application of the ordinary rules of interpreting conveyances, and no special comment on the subject is here required. The junior locator will take such rights as accrue under his patent, deducting those acquired under prior grants.[84] Such would be the case in the absence of any specific exception where the title of the senior proprietor rested in a prior patent. But where such title rests solely in a perfected prior location, clauses of exception would be necessary to protect the senior claimant, as a patent issued to the junior locator under such circumstances without clauses of exception would, in the absence of an adverse claim, deprive the senior locator of all rights within the conflict area. He would be deemed to have waived them.

**§ 783. Title conveyed by patent relates to inception of right—When evidence admissible to prove date of location.**—It is accepted as a well-established rule of law that the title conveyed by a mining patent re-

[84] In the definition of the extralateral right to be awarded to a junior patentee, his end-lines, if parallel, would be described in the patent, purporting to be the end-lines of the location, from which conflicting areas and end-line planes would be deducted the rights of the senior claim. Big Hatchet Consolidated M. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605. If, however, the patent should simply describe the zig-zag boundary of the area free from conflict, without purporting to describe the boundaries of the original location, evidence could not be introduced to enlarge the rights under the patent by showing the original end-lines of the location. In the case above cited the Washington patent describes the claim in the ordinary way by tracing the exterior lines and excepting the conflict area. An illustration of this case is shown in connection with the discussion in § 596, as figure 92B.

lates back to the inception of the right; that is, to the location upon which the patent proceedings are based.[85]

Where there is a surface conflict between junior and senior claimants, the issuance of a patent to either, without adverse, raises a conclusive presumption as to priority in favor of a patentee as to everything embraced within the patented area, and within its vertical bounding planes, subject only to the right of invasion by an outside proprietor having within his claim the apex of a vein so situated as to convey an extralateral right. But, as underground rights are not the subject of adverse claims[86] where controversies arise over, and are limited to underground segments of the vein beyond the vertical boundaries of the patented claim, the failure to adverse does not estop the parties from litigating the fact of priority.[87]

Where, however, adverse proceedings have been instituted and the question of priority has been actually

[85] Heydenfeldt v. Daney G. & S. M. Co., 93 U. S. 634, 641, 23 L. ed. 995, 13 Morr. Min. Rep. 204; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Deffebach v. Hawke, 115 U. S. 392, 401, 405, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570, 580; Talbot v. King, 6 Mont. 76, 9 Pac. 434, 440; Butte City Smokehouse Lode Cases, 6 Mont. 397, 12 Pac. 858, 860; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308, 309; Eureka Con. M. Co. v. Richmond M. Co., 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Kahn v. Old Tel. Co., 2 Utah, 174, 11 Morr. Min. Rep. 645; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 618, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; S. C., on appeal, 182 U. S. 499, 510, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200, 21 Morr. Min. Rep. 381; S. C., on appeal, 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Uinta Tunnel M. & T. Co. v. Creede & C. C. M. & M. Co., 119 Fed. 164, 169; Reed v. Munn, 148 Fed. 737, 757, 80 C. C. A. 215; Round Mountain M. Co. v. Round Mountain Sphinx M. Co. (Nev.), 129 Pac. 308 (pending on rehearing); Las Vegas & T. R. Co. v. Summerfield (Nev.), 129 Pac. 303, 304.

[86] *Ante*, § 730.

[87] For full discussion of this see *ante*, § 742.

or presumptively litigated and determined in actions arising out of the patent proceeding, or in fact in any action, the judgment in which would operate as an estoppel under the rule of *res judicata*, the patent, in connection with the judgment-roll or findings of the court, concludes all the parties on the question of priority, not only as to surface area and vertical bounding planes, but it also determines priority in favor of the successful litigant as to all underground rights flowing from the respective locations.

The question of priority having been actually or presumptively adjudicated as to one part of the conflicting claims, the judgment necessarily extends to and affects the parts of the vein not included in the conflict area,[88] and this upon the principle embodied in the maxim, "*Nemo debet bis vexari pro eadam causa,*" and the rule of estoppel by judgment.

There are several instances where the question of priority necessarily arises where the patent itself furnishes no evidence, actual or presumptive, as to the actual time to which the title conveyed relates, the most common of which are interlocking extralateral rights without surface conflict, or when such conflict existed but there was no adverse claim, and union of veins in depth.

In cases of this character, for the purpose of showing the date to which the patent relates, evidence is admissible to prove proceedings under which title originated.[89]

The following excerpts from the opinions of the courts state succinctly the rule and the reason for it:—

[88] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 690, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, 18 Morr. Min. Rep. 205.

[89] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 643, 26 L. ed. 875, 11 Morr. Min. Rep. 673.

The priority of right is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by testimony other than entries and patents.[90]

While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that that right was initiated prior to the patentee of adjoining tract to ground within his claim.[91]

It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it relates to the initiation of the patentee's right and cuts off all intervening claims. It may also be conceded that discovery of mineral is the initial fact. But when did the initial fact take place? Are all other parties concluded by the locator's unverified assertion of the date or the acceptance by the government of his assertion as sufficient with other matters to justify the issue of a patent? Undoubtedly, so far as the patent is essential to the right, the patent is conclusive, but is it beyond that? [92]

A locator might, if so disposed, place the date of discovery before it was in fact made, and at any time within three months prior to the filing of the certificate.[93]

If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not anyone who claims rights

[90] Lawson v. United States Min. Co., 207 U. S. 1, 19, 28 Sup. Ct. Rep. 15, 52 L. ed. 65.

[91] Id., 207 U. S. 1, 17, 28 Sup. Ct. Rep. 15, 52 L. ed. 65. This case, which, we have heretofore noted (§ 742), involved surface conflicts, patents having been issued without adverse claims having been asserted in the patent proceeding.

[92] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 353, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[93] Id., 196 U. S. 337, 352, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

anterior to the entry and dependent on that order show as a matter of fact what it was?[94]

Although the doctrine of relation is but a fiction of law, it is resorted to whenever justice requires it.[95]

The fact and date of discovery or lack of discovery prior to entry may, and necessarily, in many cases, must be, inquired into.[96]

This is not inconsistent with the doctrine as to the conclusiveness of a patent. There is no attempt to impeach that instrument.[97] It simply permits extrinsic evidence of a fact not required to be recited in the patent, for the sole purpose of showing the time to which the instrument relates.

For this purpose, and this purpose alone, a patentee may show the date of the location upon which the patent proceeding is based.

The patentee, in establishing this fact, will necessarily be limited to the location appearing in the patent record. He cannot be permitted to show the existence of any other or prior location.[98]

Therefore, the patent record duly authenticated by the commissioner of the general land office is admissible for this special purpose.

While these records are ordinarily received in the courts as evidence of the facts stated therein,[99] we are

[94] Id., p. 354. Lawson v. United States Min. Co., 207 U. S. 1, 8, 28 Sup. Ct. Rep. 15, 52 L. ed. 65, is to the same effect.

[95] United States v. Detroit Lumber Co., 200 U. S. 321, 334, 26 Sup. Ct. Rep. 282, 50 L. ed. 499.

[96] Uinta T. & M. & T. Co. v. Ajax G. M. Co., 141 Fed. 563, 566, 73 C. C. A. 35, following the rule in Creede & Cripple Creek M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 353, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

[97] Eureka Con. M. Co. v. Richmond M. Co., 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 204.

[98] Jacob v. Lorenz, 98 Cal. 332, 340, 33 Pac. 119, 122.

[99] Galt v. Galloway, 4 Pet. (U. S.) 332, 343, 7 L. ed. 876; Round

of the opinion that the original location and the date of actual discovery must also be proved by evidence other than that furnished by the patent record. This seems to be the rule sanctioned by the courts.[100]

According to a majority of the supreme court of Montana, in order to apply the doctrine of relation to any date prior to the entry, the date of which is inserted in the patent, a valid location complete under the state law must be shown, and that date is the date of the performance of the last of a series of acts required by the state law, i. e., the recording of the certificate. If this certificate when offered in evidence does not comply with the state law and is invalid, the date of its recording cannot be made available for purpose of relation.[1]

Chief Justice Brantly, concurring in the result reached by the majority, is of the opinion that it should relate to the discovery, and in this we think the chief justice is sustained by the weight of authority.[2]

The certificate or notice of location is not evidence of the fact of discovery, even if the fact is recited in the certificate, unless the statute of the state requires such recitals to be made.[3]

Mountain M. Co. v. Round Mountain Sphinx M. Co. (Nev.), 129 Pac. 308 (pending on rehearing).

[100] Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 82, 16 Pac. 513, 514, 16 Morr. Min. Rep. 145; Kahn v. Old Tel. M. Co., 2 Utah, 174, 188, 11 Morr. Min. Rep. 645; Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557, 566, 9 C. C. A. 613; Uinta Tunnel M. & T. Co. v. Creede & Cripple Creek M. & M. Co., 119 Fed. 164, 169; Uinta T. M. & T. Co. v. Ajax G. M. Co., 141 Fed. 563, 73 C. C. A. 35; Hickey v. Anaconda Copper Co., 33 Mont. 46, 81 Pac. 806, 812. See Round Mountain M. Co. v. Round Mountain Sphinx Co. (Nev.), 129 Pac. 308 (pending on rehearing).

[1] Hickey v. Anaconda Copper Co., 33 Mont. 46, 81 Pac. 806, 811.

[2] *Ante*, § 330.

[3] Fox v. Myers, 29 Nev. 169, 86 Pac. 793, 797. See, also, Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85, 86; Daggett v. Yreka M. & M. Co.,

**§ 784. Patent—How vacated—Within what time suit must be brought.**—The circumstances under which the government may bring an action in equity to vacate and set aside a patent are outlined by the supreme court of the United States in the case of United States v. Missouri K. & T. Railway Co.,[4] substantially as follows:—

If a patent should be fraudulently obtained, and such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or prevent the government from fulfilling an obligation incurred by it either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent. These principles apply equally where patents have been issued by mistake, and they are especially applicable where a multiplicity of suits, each one depending upon the same facts and the same questions of law, can be avoided, and where a comprehensive decree covering all contested rights would accomplish the substantial ends of justice.

This principle has, in one form or another, been enunciated by the supreme court of the United States in a long line of decisions.[5]

149 Cal. 357, 86 Pac. 968, 969; *ante*, § 393. See on this subject the language of the supreme court of the United States in Lawson v. United States M. Co., 207 U. S. 1, 19, 28 Sup. Ct. Rep. 15, 52 L. ed. 65, referring to notices of location and stipulation of counsel as to such notices.

[4] 141 U. S. 358, 377, 12 Sup. Ct. Rep. 13, 35 L. ed. 766.

[5] United States v. Minor, 114 U. S. 233, 241, 5 Sup. Ct. Rep. 836, 29 L. ed. 110; United States v. San Jacinto Tin Co., 125 U. S. 273, 279, 8 Sup. Ct. Rep. 850, 31 L. ed. 747; United States v. Beebe, 127 U. S. 338, 342, 8 Sup. Ct. Rep. 1083, 32 L. ed. 121; Moore v. Robbins, 96 U. S. 530, 533, 24 L. ed. 848; United States v. Iron S. M. Co., 128 U. S. 673, 676, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; United States v. Trinidad C. &

It is unnecessary to analyze the authorities or to note their special application to mining patents. The principles apply with equal force to all classes of patents. What constitutes such fraud in a legal sense as will warrant proceedings to vacate a patent issued under the mining laws, must be determined by resort to general rules invoked in other cases.[6]

Attacks are rarely made upon mining patents. The proceedings by which they are obtained, unlike those governing lands agricultural in character, afford an opportunity to adverse claimants prior to the issuance of the patent to litigate asserted hostile rights. The action of the government is more frequently sought to secure the cancellation of patents issued under the agricultural land laws, upon the ground that the lands embraced therein were known to be mineral at the date of the entry upon which the patent was based. Sometimes a patent of this character is issued where there is an absence of fraud and a court of equity has intervened to vacate it on the ground that it was is-

C. Co., 137 U. S. 160, 170, 11 Sup. Ct. Rep. 57, 34 L. ed. 640; Mullan v. United States, 118 U. S. 271, 278, 6 Sup. Ct. Rep. 1041, 30 L. ed. 170; United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. Rep. 426, 49 L. ed. 724.

[6] On this subject see generally: Moffat v. United States, 112 U. S. 24, 30, 5 Sup. Ct. Rep. 10, 28 L. ed. 623; United States v. Minor, 114 U. S. 233, 241, 5 Sup. Ct. Rep. 836, 29 L. ed. 110; United States v. Throckmorton, 98 U. S. 61, 69, 25 L. ed. 93; Steel v. St. Louis Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; Colorado C. & I. Co. v. United States, 123 U. S. 307, 316, 8 Sup. Ct. Rep. 131, 31 L. ed. 182; United States v. Iron S. M. Co., 128 U. S. 673, 677, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; United States v. Hancock, 133 U. S. 193, 197, 10 Sup. Ct. Rep. 264, 33 L. ed. 601; United States v. Marshall S. M. Co., 129 U. S. 579, 588, 9 Sup. Ct. Rep. 343, 32 L. ed. 734, 16 Morr. Min. Rep. 205; United States v. Stinson, 197 U. S. 200, 204, 25 Sup. Ct. Rep. 426, 49 L. ed. 724; Vance v. Burbank, 101 U. S. 514, 519, 25 L. ed. 929; Greenameyer v. Coate, 212 U. S. 434, 444, 29 Sup. Ct. Rep. 345, 53 L. ed. 587.

sued by mistake, inadvertence, under an erroneous construction of the law, or without authority of law.[7]

Where the patentee has been guilty of fraudulent misrepresentations as to the character of the land, the United States may vacate the patent;[8] but a bill in chancery brought by the United States to set aside a patent is not treated as a writ of error, or as a petition for rehearing in chancery, or as if it were a mere retrial of the case before the land office.[9]

The rule governing this class of cases is thus stated by the supreme court of the United States:—

> We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence. . . . . In this class of cases, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability

As to the nature of the fraud, who may maintain the action, pleadings and proof, see note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30; Lee v. Johnson, 116 U. S. 48, 49, 6 Sup. Ct. Rep. 249, 29 L. ed. 570; Peabody G. M. Co. v. Gold Hill M. Co., 106 Fed. 241, 242; S. C., on appeal, 111 Fed. 817, 49 C. C. A. 637, 21 Morr. Min. Rep. 591.

[7] United States v. Mullan, 7 Saw. 466, 10 Fed. 785, 791; S. C., on appeal, 118 U. S. 271, 6 Sup. Ct. Rep. 1041, 30 L. ed. 170; McLaughlin v. United States, 107 U. S. 526, 527, 2 Sup. Ct. Rep. 802, 27 L. ed. 621; Western Pac. Ry. Co. v. United States, 108 U. S. 510, 512, 2 Sup. Ct. Rep. 802, 27 L. ed. 806; United States v. Culver, 52 Fed. 81, and cases cited; United States v. C. P. R. R., 84 Fed. 218, 221; Germania Iron Co. v. United States, 165 U. S. 379, 383, 17 Sup. Ct. Rep. 337, 41 L. ed. 754; note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30.

[8] United States v. Iron S. M. Co., 128 U. S. 673, 676, 9 Sup. Ct. Rep. 195, 32 L. ed. 571.

[9] United States v. Marshall S. M. Co., 129 U. S. 579, 589, 9 Sup. Ct. Rep. 343, 32 L. ed. 734, 16 Morr. Min. Rep. 205.

of titles dependent upon these official instruments, demand that the effort to set them aside, to amend them, or correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sanctioned by the proofs.[10]

In proceedings by the United States to vacate patents the same fundamental rules of right and justice govern nations, municipalities, corporations and individuals. The equities of the United States appeal to the conscience of the chancellor with no greater or less force than do those of a private individual under like circumstances.[11]

The United States stands in no different relation as a suitor than any individual. When the government comes into court to submit a question to judicial determination, she is not acting in her capacity as a sovereign, but as a litigant, claiming the same rights and bound by the same rules as any of her citizens under similar circumstances.[12]

To set the machinery of the government in motion and secure the institution of such a suit, application

[10] Maxwell Land Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. Rep. 1015, 30 L. ed. 949, and cases cited; United States v. Stinson, 197 U. S. 200, 204, 25 Sup. Ct. Rep. 426, 49 L. ed. 724.

[11] United States v. Northern Pac. R. Co., 95 Fed. 864, 880, 37 C. C. A. 290.

[12] Lynch v. United States, 13 Okl. 142, 73 Pac. 1095, 1096, citing United States v. Bank of Metropolis, 15 Pet. (U. S.) 377, 401, 10 L. ed. 774; Brent v. Bank of Washington, 10 Pet. (U. S.) 596, 614, 9 L. ed. 547; United States v. Hughes, 11 How. (U. S.) 552, 568, 13 L. ed. 809; United States v. Throckmorton, 98 U. S. 61, 67, 25 L. ed. 93; United States v. Minor, 114 U. S. 233, 240, 5 Sup. Ct. Rep. 836, 29 L. ed. 110; United States v. Detroit T. & L. Co., 124 Fed. 393, 402; Mountain Copper Co. v. United States, 142 Fed. 625, 629, 73 C. C. A. 621; United States v. Stinson, 197 U. S. 200, 205, 25 Sup. Ct. Rep. 426, 49 L. ed. 724; United States v. Mills, 169 Fed. 686, 687; Hemmer v. United States, 204 Fed. 898.

must be made to the land department, of which application the patentee is entitled to notice.[13]

If, upon examination of the proofs submitted, the commissioner of the general land office is of the opinion that the showing is, *prima facie,* sufficient as the basis for an order for a hearing, he refers the matter to the secretary of the interior, recommending that such a hearing be had. If the secretary concurs in the recommendation, a hearing is ordered,[14] otherwise no action is taken.[15]

If, upon the hearing, the proofs are "clear, unequivocal, and convincing," the secretary of the interior presents the matter to the attorney-general, with the request that the suit be instituted in the name of the United States,[16] which request is usually complied with, although such course is not necessarily taken. The matter ultimately rests with the department of justice, of which the attorney-general is the head.

By act of congress, approved March 3, 1891,[17] it was enacted that suits by the United States to vacate and annul any patent theretofore issued should only be brought within five years from the passage of this act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the date of the issuance of the patent.

This statute must be taken to mean that the patent is to be held good and is to have the same effect against

13 In re Little Nell Lode, 16 L. D. 104.

14 In re Butte & Boston M. Co., 21 L. D. 125; In re Mary Coffin, 34 L. D. 298.

15 In re Heir of Creciat, 40 L. D. 623.

16 In re Negus, 11 L. D. 32; In re Starr, 2 L. D. 759; Mountain Maid Lode, 5 L. D. 28; Lead City Townsite v. Little Nell Lode, 17 L. D. 291; In re Abercrombie, 6 L. D. 393; United States v. Rumsey, 22 L. D. 101.

17 26 Stats. at Large, 1093, § 8; Peabody Gold M. Co. v. Gold Hill M. Co., 106 Fed. 241.

the United States that it would have had had it been valid in the first place.[18]

When the ground of vacating the patent is fraud, it has been held by some of the federal courts that the statute is not tolled until discovery, but runs in all cases from the date of the issuance of the patent.[19]

It has been said that the object of the statute is to extinguish any right the government may have had in the land and vest a perfect legal title in the adverse holder after six years from the date of the patent, regardless of any mistake or error in the land department, or fraud or imposition of the patentee.[20]

Other courts of equal dignity, however, maintain the doctrine that the statute does not commence to run until the fraud is discovered.[20a]

In a case where the United States could successfully maintain a suit for the vacation of a patent wrongfully obtained, a voluntary reconveyance of land so patented may be accepted.[21]

[18] United States v. Chandler-Dunbar Co., 209 U. S. 447, 450, 28 Sup. Ct. Rep. 579, 52 L. ed. 881.

[19] United States v. American Lumber Co., 85 Fed. 827, 832, 29 C. C. A. 431; United States v. Smith & Werner, 181 Fed. 545, 554; United States v. Exploration Co., 190 Fed. 405, 406.

[20] United States v. Smith, 181 Fed. 545, 554, citing United States v. Winona & St. Paul R. R., 165 U. S. 463, 476, 17 Sup. Ct. Rep. 368, 41 L. ed. 789; United States v. Chandler-Dunbar Co., 209 U. S. 447, 450, 28 Sup. Ct. Rep. 579, 52 L. ed. 881.

[20a] United States v. Exploration Co., 203 Fed. 387. We understand that the question is now before the supreme court of the United States.

[21] San Francisco M. Co., 29 L. D. 397; In re Tryon, 29 L. D. 475.

# TITLE VIII.

## RIGHTS AND OBLIGATIONS ARISING OUT OF OWNERSHIP IN COMMON OF MINES AND JOINT PARTICIPATION IN MINING VENTURES.

CHAPTER

I. TENANTS IN COMMON.

II. MINING PARTNERSHIPS.

(1929)

# CHAPTER I.

## TENANTS IN COMMON.


§ 788. Cotenancy, how created—General rules governing tenants in common applicable to ownership in common of mines.

§ 789. Right of each cotenant to occupy and use the common property.

§ 789a. Occupying tenant not liable at common law to account, in absence of exclusion of cotenant—Judicial and statutory modifications.

§ 790. Remedy of excluded cotenant—Accounting between tenants in common.

§ 791. Leases, licenses, and conveyances executed by one of several cotenants.

§ 792. Partition of mining property.


**§ 788. Cotenancy, how created—General rules governing tenants in common applicable to ownership in common of mines.**—A tenancy in common of a mining claim upon the public domain arises when two or more persons participate in its location.[1]

We have heretofore had occasion to treat of the relationship thus created and the rights and duties flowing therefrom with respect to relocations,[2] forfeiture to co-owners under the federal law,[3] and the attempt of one tenant in common to secure a government patent to the exclusion of his cotenants.[4]

In harmony with the views therein expressed, it may be stated generally that the relationship between cotenants is such that where one of them acquires an outstanding conflicting title, such title inures to the benefit of all, whether the community of interest arise by location or otherwise.[5] The same doctrine has

[1] *Ante*, § 331.

[2] *Ante*, § 406.

[3] *Ante*, § 646.

[4] *Ante*, § 728.

[5] Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 945, 19 Morr. Min. Rep. 556; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R.

been applied where a cotenant purchased an interest in an *adjoining* claim, containing the apex of the vein which the cotenants had been mining within their own surface lines.[6]

With the exception of the title acquired originally by a location, a tenancy in common in mines and mining property is created in the same manner as in other classes of real property. From such cotenancy, however created, flow certain rights and obligations.

These rights and obligations may be enlarged or restricted in a number of ways through contractual relations, and the co-owners may thus occupy toward each other, or toward third persons, a relationship essentially different from that of mere cotenants. For the present we deal exclusively with cotenancy pure and simple, treating the parties strictly in the light of co-owners in mining property, eliminating from consideration all elements other than those arising out of the legal relation, and dealing only with those engagements formed "by the bare effect of their interest in the thing that is common to them."[7]

It is not to be inferred that these "engagements" are different, in respect to property whose principal value and utility lie in its mineral character, from those which arise where the property is valuable and useful for other purposes. It may be accepted as well settled, in the absence of some statutory rule to the contrary, that the rights, duties, and obligations of

A. 184; 19 Morr. Min. Rep. 615; Franklin M. Co. v. O'Brien, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; Perelli v. Candiani (*dictum*), 42 Or. 625, 71 Pac. 537, 538; Ballard v. Golob, 34 Colo. 417, 83 Pac. 376, 379; Stephens v. Golob, 34 Colo. 429, 83 Pac. 381; Mills v. Hart, 24 Colo. 505, 65 Am. St. Rep. 241, 52 Pac. 680; Austin v. Barrett, 44 Iowa, 488; Freeman on Cotenancy, § 154.

[6] Cedar Canyon Cons. M. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749, 752, 22 Morr. Min. Rep. 11.

[7] Freeman on Cotenancy, § 3.

cotenants in a mine or mining claim are relatively the same as if a farm were the subject of the common ownership, so long as such relationship is unaffected by contract between the parties, express or implied. It is not our purpose to enter into an exhaustive discussion of the general laws of cotenancy. We shall limit ourselves to a brief application of some of these laws to the character of property under consideration. This will enable us to contrast to a better advantage cotenancies with mining partnerships, and to apply the decisions of the courts with a greater degree of precision.

We exclude from present consideration all those elements which arise distinctively out of the federal laws, confining ourselves to what may be called the common-law phase of the relationship.

**§ 789. Right of each cotenant to occupy and use the common property.**—In order to obtain a clear understanding of the rights and liabilities of tenants in common of mineral land as between themselves we must briefly consider the difference between the estate of such tenants in common and that of tenants for life or for years.

Mineral once taken from the ground works a diminution of the estate and therefore, at common law, a tenant for life or for years cannot open a new mine and exhaust the mineral to the prejudice of the estate in remainder or reversion but may work an open mine, even to the point of exhaustion, for in such case he merely uses the land appropriately to its character.[8] Tenants in common, on the other hand, are the owners of the substance of the estate. They owe no duties to

[8] 1 Wash. Real Prop., 6th ed., p. 132; Clavering v. Clavering, 2 P Wms. 388, 24 Eng. Reprint, 780; Snowdon Slate Quarries, L. R. 4 App. Cas. 454, 466; Priddy v. Griffith, 150 Ill. 560, 41 Am. St. Rep. 397, 37 N. E.

successors in interest, for they have dominion of the fee in its entirety. Such being the nature of their estate, it follows that they may, one or all, make such reasonable use of the common property as they see fit, in order to avail themselves of the benefit and value of such ownership. In the exercise of this right they may work new or old mines to exhaustion, even though it may consume the whole value of the estate.[9]

> It is no valid objection that the use is consumption, and it is no fault of the tenant that it is not more endurable.[10]

As was said by Vice-Chancellor Bacon, in Job v. Potton,[11]—

> How is a tenant in common to enjoy his share (if that is the right expression) of the common property of a coal mine, if he is not at liberty to dig and carry away the coal?

The taking of ore from the mine is rather the use than the destruction of the estate within the meaning of the general rule. The results of the tenant's labor and capital are in the nature of proceeds or profits, the partial exhaustion being but incidental consequence of the use.[12] The same principle applies to the extraction of oil and gas.[13]

999, 1000; Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564; Koen v. Bartlett, 41 W. Va. 559, 56 Am. St. Rep. 884, 23 S. E. 664, 666, 31 L. R. A. 128; Marshall v. Mellon, 179 Pa. 371, 57 Am. St. Rep. 601, 36 Atl. 201, 35 L. R. A. 816; Shulthis v. MacDougal, 162 Fed. 331, 343.

[9] McCord v. Oakland Q. M. Co., 64 Cal. 134, 141, 49 Am. Rep. 686, 27 Pac. 863, 865; Elwell v. Burnside, 44 Barb. (N. Y.) 447.

[10] Irwin v. Covode, 24 Pa. 162, 15 Morr. Min. Rep. 120.

[11] L. R. 20 Eq. 84, 93, 14 Morr. Min. Rep. 329.

[12] McCord v. Oakland Q. M. Co., 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863, 865; Anaconda C. M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. 924, 926.

[13] Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 1 Ann. Cas. 403, 75 Pac.

Even if it be conceded that a tenant in common may be liable to his cotenants in case he commits waste, the usual method of enjoying the land does not constitute such waste.[14]

Under the English rule, any joint tenant, tenant in common or coparcener of a mine is entitled to enter upon and work it.[15]

**§ 789a. Occupying tenant not liable at common law to account, in absence of exclusion of cotenant—Judicial and statutory modifications.**—As has already been stated, these rights belong to each cotenant. The corollary is equally important that the right of any cotenant to the use and enjoyment of the estate is subject to the contemporaneous right of the others to participate therein. Although this proposition seems on its face to be the expression of a very simple and

995, 996; Compton v. People's Gas Co., 75 Kan. 572, 10 L. R. A., N. S., 787, 89 Pac. 1039, 1040; Burnham v. Hardy Oil Co. (Tex. Civ. App.), 147 S. W. 330.

[14] Vervalen v. Older, 8 N. J. Eq. 98, 10 Morr. Min. Rep. 540; Capner v. Flemington M. Co., 3 N. J. Eq. 467; Huntley v. Russell, 13 Q. B. 572, 116 Eng. Reprint, 1381; Job v. Potton, L. R. 20 Eq. 84, 93, 14 Morr. Min. Rep. 329; Angier v. Agnew, 98 Pa. 587, 42 Am. Rep. 624; Russell v. Merchants' Bank, 47 Minn. 286, 28 Am. St. Rep. 368, 50 N. W. 228; Findlay v. Smith, 6 Munf. (Va.) 134, 8 Am. Dec. 733, 13 Morr. Min. Rep. 182; Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308, 309; Reed v. Reed, 16 N. J. Eq. 248; Hihn v. Peck, 18 Cal. 640.

At common law, strictly, waste would not lie against a cotenant; but by Statute of Westminster II, chapter 22, this remedy was allowed. This statute is considered part of the common law in many states. "One tenant in common may have an action of waste against his cotenant, . . . . by statute, or at the common law, in the several states." 1 Washburn on Real Property, 6th ed., § 888. " . . . . and this is doubtless either the statute or the received common law in every part of the United States." 4 Kent, p. 369, note C.

[15] MacSwinney on Mines, p. 110; Bainbridge on Mines, 4th ed., pp. 25, 26; Rogers on Mines, 2d ed., p. 267.

obvious truth, a study of the adjudicated cases will show that much confusion and error has resulted from a misconception of the real nature and extent of this right. Where one cotenant excludes another, it is of course plain that the excluded cotenant has suffered injury and is entitled to a remedy therefor.[16]

It often occurs, however, that some of the tenants in common simply abstain from the use and enjoyment of the common property, while others occupy without excluding their cotenants. Such a situation often gives rise to the question, Shall the occupying tenant account to his cotenants for the use of the estate? This question ought not to be impossible, or even difficult to answer, if pains be taken to preserve a clear-cut idea of the fundamental right of use and enjoyment. We have seen that the tenant in common is entitled to the use of the whole and every part of the common property, subject to the contemporaneous right of his cotenants to the same use and enjoyment. This does not mean that one tenant in common is entitled to the issues and profits of the *estate,* created or brought forth by the industry of his cotenant. These are merely the results of such cotenant's exercise of his own rights. So long as he exercises those rights without infringing the correlative rights of his associates in interest, he is entitled to the resulting product, even though it may, by the inactivity of such associates, be the fruit of the entire estate.[17]

If there be hardship in such a case, it results rather from the nature of the tenancy than from the application of any harsh principle in the administration of the

16 *Post,* § 790.

17 Ferris v. Montgomery L. & I. Co., 94 Ala. 557, 33 Am. St. Rep. 146, 10 South. 607, 609.

law. The adoption of an opposite rule would enable a tenant in common to lie by and await, without risk, the issue of his cotenant's thrift and enterprise, and in the event of loss say, "It is your affair, not mine," and in the event of profit claim his share therein.

The general rule may be stated to be that in the absence of statutes to the contrary, a tenant in common may make such use of the common property as its nature makes appropriate, and is accountable to none therefor, unless he exclude his cotenant.[18] To remedy the apparent hardship of the law the English Statute of 4 and 5 Anne (chapter 16, section 27) was adopted, giving a tenant in common an account against his cotenant for "receiving" more than his share. The courts in construing the law, manifesting perhaps a sounder judgment than the lawmakers, held that this only applied to cases where the cotenant actually received rents or profits from third parties, and not to cases where there was mere use and occupation by one and forbearance to occupy by others. The tenant occupying and cultivating the estate was held to be solely entitled to the fruits of his own industry.[19] This construction of the English and similar American statutes has been largely but not universally followed in the United States; some of the states holding the Statute of 4 and 5 Anne to constitute a part

[18] Ballou v. Wood, 8 Cush. (Mass.) 48, 54; Mahon v. Barnett (Tex.), 45 S. W. 24; Belknap v. Belknap, 77 Iowa, 71, 41 N. W. 568, 569; Van Ormer v. Harley, 102 Iowa, 150, 71 N. W. 241, 243; Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550; McCord v. Oakland Q. M. Co., 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863, 866; Ward v. Ward's Heirs, 40 W. Va. 611; 52 Am. St. Rep. 911, 21 S. E. 746, 748, 29 L. R. A. 449; Humphries v. Davis, 100 Ind. 369.

[19] Henderson v. Eason, 17 Q. B. 701, 21 L. J. Q. B. 82, 117 Eng. Reprint, 1451; Norris v. Gould, 15 W. N. C. 187.

of the common law and adopting it as such.[20] In several of the states statutes have been adopted which go further than those of England, and plainly provide for an accounting between cotenants for use and occupation as well as for rents.[21] In Montana,[22] a cotenant is allowed to mine, but is required to account for net profits to nonjoining cotenants. In Arkansas,[23] an accounting is required for profits or benefits greater than his share. The Oregon law[24] provides for an action to be brought by the nonworking cotenant for his just share of the rents or profits, and Oklahoma[25] has a similar provision. The other western states have no statutory provisions for accountability to the nonjoining cotenant in the absence of circumstances tending to show that he has been actually excluded from earning his share. Some states, however, treat the Statute of Anne as having no force unless adopted by statute.[26]

Another limitation has been made upon the strict common-law doctrine in several states by making

20 Freeman on Cotenancy, § 275, note; Humphries' Admr. v. Davis, 100 Ind. 369; Reynolds v. Wilmeth, 45 Iowa, 693; Gage v. Gage, 66 N. H. 282, 29 Atl. 543, 547, 28 L. R. A. 829.

21 Woolley v. Schrader, 116 Ill. 29, 4 N. E. 658, 662; Cheney v. Ricks, 187 Ill. 171, 58 N. E. 234, 235; Butte & B. Cons. M. Co. v. Montana O. P. Co., 25 Mont. 41, 63 Pac. 825; Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145, 147; West v. Weyer, 46 Ohio St. 66, 15 Am. St. Rep. 552, 18 N. E. 537, 538; Knowles v. Harris, 5 R. I. 402, 73 Am. Dec. 77; Barnum v. Landon, 25 Conn. 137, 14 Morr. Min. Rep. 250; Conn. Rev. Stats. 1875, p. 467, § 4; Coleman's Appeal, 62 Pa. 252, 277, 14 Morr. Min. Rep. 221; Fulmer's Appeal, 128 Pa. 24, 15 Am. St. Rep. 662, 18 Atl. 493; Shiels v. Stark, 14 Ga. 429, 435; Cutler v. Currier, 54 Me. 81, 91; Hayden v. Merrill, 44 Vt. 336, 348, 8 Am. Rep. 372; Dangerfield v. Caldwell, 151 Fed. 554, 558, 81 C. C. A. 400.

22 Rev. Codes, § 6499.

23 Digest of Stats., § 6295.

24 Lord's Or. Laws, § 7195.

25 Comp. Laws, § 4096.

26 Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550.

tenants in common liable for waste, and in such states what was waste in tenancy for life or for years would usually be waste by tenants in common.[27] These statutes, though not always mentioned as the *ratio decedendi*, often result in depriving tenants in common of the right to take timber and mineral, or compel them to account therefor.[28]

In the precious metal bearing states, however, statutory provisions extending the doctrine of waste to tenants in common will seldom, if ever, have the effect of depriving the tenant in common of the right to work a mine located upon the public domain under the federal mining laws. As we have already shown, the tenant for life or for years had the right to work an open mine; and the recognized reason why such an act was not deemed waste was, that it constituted the normal use of the property in the character which it possessed at the time of the accrual of the tenancy. Conversely, such tenant had no right to open and work a new mine, because that would be to change the nature of the estate and to subject it to a use beyond the contemplation of the grantor to the prejudice of the remainderman or reversioner. As it is "valuable mineral deposits in land" which are "open to explora-

[27] Elwell v. Burnside, 44 Barb. (N. Y.) 447; McCord v. Oakland Q. M. Co., 64 Cal. 134, 139, 49 Am. Rep. 686, 27 Pac. 863, 864; Cal. Code Civ. Proc., § 732; Utah Comp. Laws, § 3507; Carter's Alaska Code, § 321; Colo. Rev. Stats. 1908, § 3603; Idaho Rev. Codes, § 4530; Nev. Comp. Laws, § 3347; N. D. Rev. Codes, § 7539; Or. L. O. L., § 345; S. D. Rev. Code, § 693; Wash. Ann. Codes, § 938.

[28] Atkinson v. Hewitt, 51 Wis. 281, 8 N. W. 211, 213; Cosgriff v. Dewey, 164 N. Y. 1, 79 Am. St. Rep. 620, 58 N. E. 11; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122; Williamson v. Jones, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, 412, 38 L. R. A. 694; Cecil v. Clark, 47 W. Va. 402, 81 Am. St. Rep. 802, 35 S. E. 11, 13; Dangerfield v. Caldwell, 151 Fed. 554, 558, 81 C. C. A. 400; Hennes v. Hebard & Sons, 169 Mich. 670, 135 N. W. 1073.

tion and purchase,'' as such,[29] and as the sole purpose in locating or acquiring a mining claim, both in the contemplation of the locator and the government, must necessarily be to acquire the right to use and enjoy it as a mine, the distinction between open and unopened mines can hardly have any application to a mining claim. Whether such claim is physically open or not, it cannot be waste to subject it to the only use for which it is acquired.

> The word ''waste'' is not an arbitrary term to be applied inflexibly, without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong. As said by Roane, J., in Findlay v. Smith,[30] in considering what is waste in this country, it is to be remarked that the common law by which it is regulated adapts itself in this as in other cases to the varied situations and circumstances of the country. . . . . The law on this subject must be ''applied with reasonable regard to circumstances.''[31]
>
> The strict rules of the common law of England respecting waste and the rights of tenants for life do not obtain here. . . . . It is not use, but abuse, that is waste. The grant must be held to include the use of these lands irrespective of whether mines were opened upon them before or after the husband's death. . . . . There is but one mode of enjoyment of the land in question; but one source of revenue or profit. The land is susceptible of but one use.[32]

[29] Rev. Stats., § 2319; 17 Stats. 91; Comp. Stats. 1901, p. 1424; 5 Fed. Stats. Ann. 4.

[30] 6 Munf. 134, 8 Am. Dec. 733, 13 Morr. Min. Rep. 182.

[31] McCord v. Oakland Q. M. Co., 64 Cal. 134, 140, 49 Am. Rep. 686, 27 Pac. 863, 864.

[32] Seager v. McCabe, 92 Mich. 186, 52 N. W. 299, 302, 16 L. R. A. 247. See, also, 4 Kent's Commentaries, 76–78; 1 Wash. Real Prop., 6th ed., § 280; McKay v. Wait, 51 Barb. (N. Y.) 225; Bond v. Lockwood, 33 Ill. 212; Drown v. Smith, 52 Me. 141; Angier v. Agnew, 98 Pa. 587, 42 Am. Rep. 624.

Moreover, as the federal statutes require a "discovery" as a prerequisite to title, mines on the public domain are generally in fact "open mines," and as such are not within the doctrine of waste.[33]

In some states a tenant in common is either held to account or enjoined from mining or taking timber, upon various grounds, such as the insolvency of the occupying tenant, the pendency of partition proceedings, destructive abuse of the property, or because the nature of the property is such that its use and occupation by one cotenant is deemed equivalent to exclusion of the other.[34]

It will thus be seen that the question of liability of an occupying tenant in common to account to his non-occupying cotenant, where there has been no ouster or exclusion, must be referred in each jurisdiction to the local statutes and to the decisions of the courts—decisions not only construing the statutes herein referred to, but in some states departing more or less from the strict application of common-law principles.[35]

**§ 790. Remedy of excluded cotenant—Accounting between tenants in common.**—The right of a cotenant to use the common property is based upon the assumption that the one so using does not deny the right of the others or exclude them from possession. When one of several co-owners takes exclusive possession of the premises under such circumstances as amount in

[33] McCord v. Oakland Q. M. Co., *supra*.

[34] Stout v. Curry, 110 Ind. 514, 11 N. E. 487; Atkinson v. Hewitt, 51 Wis. 281, 8 N. W. 211, 213; Coffin v. Loper, 25 N. J. Eq. 443; Low v. Holmes, 17 N. J. Eq. 148; Edsall v. Merrill, 37 N. J. Eq. 114, 117; Davidson v. Thompson, 22 N. J. Eq. 83; Burris v. Jackson, 8 Del. Ch. 345, 68 Atl. 381.

[35] Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223; Dangerfield v. Caldwell, 151 Fed. 554, 558, 81 C. C. A. 400.

law to an ouster, the excluded cotenant is entitled to relief in some form. The nature of the remedy may depend upon state statutes. While the right of redress may exist independent of state legislation,[36] the method to be pursued in securing such redress may not always be the same in all jurisdictions.

As a general rule, one tenant in common cannot have an injunction against his cotenant; but this species of preventive relief has been upheld under special circumstances, as where destruction of the estate, not within the usual legitimate enjoyment, is alleged,[37] or where the tenant is in possession under a lease from his cotenants, and has thus temporarily lost his *status* as tenant in common, and assumed that of an ordinary occupying tenant of the premises.[38]

Under a statute which provided that—

> If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy, or tenancy in common, did not exist,

it was held that an excluded tenant in common, whose right was practically denied, was entitled to an injunction against the operating cotenant.[39]

[36] Childs v. Kansas City R. R. Co. (Mo.), 17 S. W. 954, 957; Johnson v. Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72; Dodge v. Davis, 85 Iowa, 77, 52 N. W. 2, 3.

[37] Johnson v. Johnson, *supra;* Hole v. Thomas, 7 Ves. Jr. 589, 32 Eng. Reprint, 237; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122; Leathering v. McInnis, 85 Miss. 416, 37 South. 1018; Burris v. Jackson, 8 Del. Ch. 345, 68 Atl. 381; Hancock v. Tharpe, 129 Ga. 812, 60 S. E. 168; Williamson v. Fleeger, 137 Ill. App. 42.

[38] Twort v. Twort, 16 Ves. Jr. 128, 33 Eng. Reprint, 932.

[39] Mont. Code Civ. Proc., § 592, as amended; Rev. Codes 1907, § 6499; Anaconda C. M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. 924, 926;

As we have already seen, the occupying tenant of a mine under such a statute is accountable even in the absence of exclusion.[40] As the effect of the Montana statute was to enable the nonassenting owner of a fractional interest in a mine to stop all work and development,[41] the legislature of 1899 amended the law so as to permit a cotenant to mine, extract, and dispose of ore from the common property, subject to the liability to account to the cotenant for net profits.[42] This amendment was held to apply only to tenancies in common arising subsequent to its adoption.[43]

It may be generally conceded, particularly in the precious metal bearing states where the reformed procedure has been adopted, that a cotenant in possession, who either works in so unskillful a manner as to amount to destructive waste, or being in possession under an unequivocal hostile assertion of exclusive title, seeks to appropriate the entire product to his own use, an injunction will lie at the instigation of the injured cotenant. The remedy at law by an action of trespass or trover for rents and profits, or one sounding in damages only, might be wholly inadequate.[44]

There exists in reason no distinction between this class of cases and those where a disseisor holds lands

Red Mountain Cons. M. Co. v. Essler, 18 Mont. 174, 44 Pac. 523; Butte & B. M. Cons. M. Co. v. Montana O. P. Co., 24 Mont. 125, 60 Pac. 1039, 1041; 25 Mont. 41, 63 Pac. 825, 827; Connole v. Boston & M. Cont. C. & S. M. Co., 20 Mont. 523, 52 Pac. 263, 264. See, also, Colo. Rev. Stats., § 3603; People ex rel. Breene v. District Court, 27 Colo. 465, 62 Pac. 206, 207.

[40] *Ante*, § 789a.

[41] Harrigan v. Lynch, 21 Mont. 36, 52 Pac. 642, 644.

[42] Mont. Laws of 1899, p. 124; Rev. Codes 1907, § 6499.

[43] Butte & Boston Cons. M. Co. v. Montana O. P. Co., *supra;* Heinze v. Butte etc. Cons. Min. Co., 126 Fed. 1, 10, 61 C. C. A. 63; Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145.

[44] Binswanger et al. v. Henninger, 1 Alaska, 509.

of another and no question as to tenancy in common arises.[45]

Courts of equity have gradually enlarged their jurisdiction, and now they interfere to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the defendant, or if otherwise the plaintiff cannot obtain relief at law.[46]

The excluded cotenant might bring partition proceedings, and obtain the appointment of a receiver by interlocutory order.[47] Where such suit is pending and the ownership of one of the interests is in dispute, the court has power to appoint a receiver for the share of the ore being mined by the cotenants in possession pertaining to such interest, where necessary to protect the rights of all the parties,[48] and during such litigation circumstances may arise justifying the extending of the receivership to the entire property.[49] The

45 Sears v. Sellew, 28 Iowa, 501.

46 Spear v. Cutter, 5 Barb. (N. Y.) 486; Hart v. Mayor, 3 Paige (N. Y.), 214; Winship v. Pitts, 3 Paige (N. Y.), 259; New York P. & D. Establishment v. Fitch, 1 Paige (N. Y.), 97, 99; Hanson v. Gardner, 7 Ves. Jr. 305, 308, 32 Eng. Reprint, 125; Thomas v. Oakley, 18 Ves. Jr. 184, 34 Eng. Reprint, 287, 7 Morr. Min. Rep. 254; Field v. Beaumont, 1 Swanst. 204, 208, 36 Eng. Reprint, 358, 7 Morr. Min. Rep. 257; Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 497, 10 Am. Dec. 353, 10 Morr. Min. Rep. 696; Kane v. Vanderburgh, 1 Johns. Ch. (N. Y.) 11, note; Obert v. Obert, 5 N. J. Eq. 397; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; Waldron v. W. M. Ritter Lumber Co., 70 W. Va. 470, 74 S. E. 687; Doane v. Allen (Mich.), 138 N. W. 228; Driver v. New (Ala.), 57 South. 437, 438.

47 MacSwinney on Mines, p. 111; Roberts v. Eberhardt, Kay, 148, 158, 159, 69 Eng. Reprint, 63, 11 Morr. Min. Rep. 301; Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927, 933; High on Receivers, §§ 606, 607; Smith on Receivers, §§ 15, 317.

48 Heinze v. Butte & Boston Consolidated Min. Co., 126 Fed. 1, 7, 61 C. C. A. 63.

49 Id. See dissenting opinion of Ross, J.

general rule is, however, that ore in a mine is of the very substance of the estate, and that its extraction by a receiver is not to be permitted except on convincing proof of the necessity of such mining operations.[50] This suggests the thought that the modern judicial tendency is to refuse to appoint receivers in all classes of cases except where corporations are engaged in performance of public or *quasi*-public services.[51]

One tenant in common cannot compel his cotenants to unite with him in the working and exploitation of the common property,[52] or bind the interest of the other by contract.[53] This is the general rule, but there may be a contract implied in fact to reimburse or contribute where one cotenant does more than his share of the annual assessment work.[54]

It is entirely immaterial whether the one in possession and desiring to mine has the larger or the smaller interest in the property, or owns or controls more than an undivided half. The rule that those holding the majority interests have a right to dictate the policy and control the management and working of the property as against nonconsenting owners of the minority interest, has no application to cotenants. This doctrine applies only in cases of mining partnerships, or where the original rights and obligations of cotenants

[50] Id. Citing Tornanses v. Melsing, 106 Fed. 775, 785, 45 C. C. A. 615.

[51] Ross, J., dissenting opinion in Heinze v. Butte & Boston Cons. Min. Co., *supra*.

[52] Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658, 14 Morr. Min. Rep. 308; Morgan v. Morgan, 23 La. Ann. 502.

[53] Chase v. Savage, 2 Nev. 9, 9 Morr. Min. Rep. 476; Rico Reduction Works v. Musgrave, 14 Colo. 79, 23 Pac. 458, 459; Charles v. Eshleman, 5 Colo. 107, 2 Morr. Min. Rep. 65; Stickley v. Mulrooney, 36 Colo. 242, 87 Pac. 547, 548; but see Helmken v. Meyer, 138 Ga. 457, 75 S. E. 586, 587.

[54] McDaniel v. Moore, 19 Idaho, 43, 112 Pac. 317, 319.

are enlarged or restricted by virtue of some contract, express or implied, existing between them.[55]

In Hawkins v. Spokane Hydraulic Mining Co.,[56] the owner of an undivided one-eighth interest in a claim took possession and worked the property in order to dispose of a supply of water owned by him exclusively, or, as the court said on the second appeal:[57]—

> He proposes to work out the claim for what the water will bring; the seven-eighths interest of plaintiff being simply appropriated to pay water rates in which he, plaintiff, had no interest whatever.

The supreme court of Idaho gave the majority owner relief by construing a state statute[58] to mean that mere joint ownership, without any joint working of the claim, created a mining partnership and thus allowing the majority owner to enjoin the further working of the claim. This anomalous doctrine was overruled in a later case.[59] In a somewhat analogous case[60] the supreme court of Montana allowed an owner of the majority interest to enjoin the working of the common property on the theory that the manner in which the property was operated was tantamount to an exclusion of the co-owner. Relief can usually be afforded, where any hardship such as that in the Hawkins case arises, on the theory of the Montana case or on the ground that the cotenant was operating

[55] Dougherty v. Creary, 30 Cal. 291, 89 Am. Dec. 116, 1 Morr. Min. Rep. 35; Hawkins v. Spokane Hydraulic Min. Co., 2 Idaho, 970, 3 Idaho, 241, 28 Pac. 433, 434.

[56] 2 Idaho, 970, 3 Idaho, 241, 28 Pac. 433, 434.

[57] 3 Idaho, 650, 33 Pac. 40, 41.

[58] Idaho Rev. Stats., § 3300; Civ. Code 1901, § 2274; Rev. Codes 1908, § 3361.

[59] Madar v. Norman, 13 Idaho, 585, 92 Pac. 572, 573.

[60] Anaconda C. M. Co. v. Butte & Boston M. Co., 17 Mont. 519, 43 Pac. 924, 925.

the property in a manner equivalent to destructive waste.

A cotenant in possession, whether his interest be large or small, cannot bind those who do not voluntarily participate in the venture.[61]

He cannot force direct contribution for improvements made,[62] nor for the costs and expense of development or working.[63] But a promise implied in fact will sometimes be found to contribute to the expense of assessment work.[64]

A nonparticipating cotenant's interest may, however, be subjected to a statutory lien for improvements if he fail to comply with the law requiring him to post a notice exempting him therefrom.[65]

The right of one cotenant to compel contribution from the others is limited to cases where the property is subjected to a common burden, and where one in removing it pays more than his just proportion, or possibly to the case of repairs absolutely necessary to pro-

[61] Rico Reduction & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. 458; Chase v. Savage, 2 Nev. 9, 9 Morr. Min. Rep. 476; Stickley v. Mulrooney, 36 Colo. 242, 87 Pac. 547, 548; but see Helmken v. Meyer, 138 Ga. 457, 75 S. E. 586, 587.

[62] Newman v. Driefurst, 9 Colo. 228, 11 Pac. 98, 100; Welland v. Williams, 21 Nev. 230, 29 Pac. 403, 404; Calvert v. Aldrich, 99 Mass. 74, 96 Am. Dec. 693; Alleman v. Hawley, 117 Ind. 532, 20 N. E. 441; Bazemore v. Davis, 55 Ga. 504; Austin v. Barrett, 44 Iowa, 488; Stevens v. Thompson, 17 N. H. 103; Ford v. Knapp, 31 Hun, 522; Taylor v. Baldwin, 10 Barb. (N. Y.) 582; Crest v. Jack, 3 Watts (Pa.), 238, 27 Am. Dec. 353; Thurston v. Dickinson, 2 Rich. Eq. (S. C.) 317, 46 Am. Dec. 56; Farrand v. Gleason, 56 Vt. 633; Kidder v. Rixford, 16 Vt. 169, 42 Am. Dec. 504; Stickley v. Mulrooney, 36 Colo. 242, 87 Pac. 547, 548; Wolfe v. Childs, 42 Colo. 121, 126 Am. St. Rep. 152, 94 Pac. 292, 294.

[63] Brunswick v. Winters' Heirs, 3 N. M. 241, 5 Pac. 706, 708.

[64] McDaniel v. Moore, 19 Idaho, 43, 112 Pac. 317, 319.

[65] Post v. Fleming, 10 N. M. 476, 62 Pac. 1087, 1088; Botts v. Fleming, 10 N. M. 490, 62 Pac. 1119.

tect the property from going to ruin.[66] But laches will bar claims for such contribution.[67]

We have already shown that in certain jurisdictions, by virtue of peculiar statutes and decisions, the common-law rights of tenants in common have been so far curtailed as to make an occupying tenant liable to account to his cotenant, even in the absence of ouster or exclusion, and that in some special circumstances occupation by one is held to be equivalent to exclusion of the other.[68] Where such conditions obtain, the following rules apply:—

While each cotenant has the privilege of entering upon the property and making such use of it as its nature will permit, without committing destructive waste, he will not be entitled to retain for his exclusive use any more than his proportionate share of the product;[69] nor to use underground works constructed in the ground owned in common to remove ore from adjoining land not held in common.[70]

He is liable in an action for an accounting by a non-participating cotenant who may recover his proportionate share of the net profits, if any.[71]

[66] Dech's Appeal, 57 Pa. 467; Leigh v. Dickenson, 12 Q. B. D. 194; Sharp v. Zeller, 114 La. 549, 38 South. 449; Starks v. Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149.

[67] German v. Heath, 139 Iowa, 52, 116 N. W. 1051.

[68] *Ante*, § 789a.

[69] Denys v. Shuckburgh, 4 Younge & C. Eq. Ex. 42; Jacobs v. Seward, L. R. 5 H. L. 464, 475, 478; Job v. Potton, 20 Eq. 84, 93, 14 Morr. Min. Rep. 329.

[70] People ex rel. Breene v. District Court, 27 Colo. 465, 62 Pac. 206, 207; Laesch v. Morton, 38 Colo. 171, 120 Am. St. Rep. 106, 87 Pac. 1081, 1082.

[71] Job v. Potton, *supra;* Abbey v. Wheeler, 85 Hun, 226, 32 N. Y. Supp. 1069; Stenger v. Edwards, 70 Ill. 631, 9 Morr. Min. Rep. 368; Sweeney v. Hanley, 126 Fed. 97, 100, 61 C. C. A. 153.

The working cotenant who does not exclude his co-owners nor wrongfully assert entire ownership[72] may deduct from the gross product all legitimate expense of working;[73] but in case of loss, he cannot compel his co-owners to contribute.[74] It has been held that where ore is being mined by the cotenant in possession and the owner of the undivided minority interest is excluded and his interest repudiated, the majority owners are guilty of a willful trespass as to the excluded co-owner and are responsible for the gross value of the ore extracted pertaining to such interest.[75]

But in a later case the same court said of a part owner in possession who had wrongfully excluded his cotenant:—

> His right to credit for such expenses (of extraction) was not affected by his inequitable conduct in denying his cotenant's title, in violating his parol agreement with the appellee to carry on no mining on the property, in refusing to account, or in making the false averment in his answer that the profits over and above expenses were but $5,000.[76]

Tenants in common are not bound to use the common property jointly by means of a contract of partnership between them, but may possess, use, and enjoy it, accounting to their cotenants for so much of the rents and profits as they may receive beyond their just share and proportion. Where a tenant in com-

[72] Sweeney v. Hanley, *supra.*

[73] Id.; Graham v. Pierce, 19 Gratt. (Va.) 28, 100 Am. Dec. 658, 14 Morr. Min. Rep. 308. See, also, Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. (156), 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17; Dettering v. Nordstrom, 148 Fed. 81, 85, 78 C. C. A. 157; Silver King Coalition Mines Co. v. Silver King C. M. Co., 204 Fed. 166, 180.

[74] Henderson v. Eason, 17 Q. B. 701, 721, 21 L. J. Q. B. 82, 117 Eng. Reprint, 1451.

[75] Sweeney v. Hanley, *supra.*

[76] Dettering v. Nordstrom, 148 Fed. 81, 84, 78 C. C. A. 157.

mon uses the common property to the exclusion of his cotenants, or occupies and uses more than his just share and proportion, the best measure of his accountability to his cotenants is their shares of a fair rent of the property use. In the case of tenancy in common in a mine, an account of issues and profits is the proper mode of adjustment. Each is to be charged with all his receipts, and credited with all his expenses on account of his operation of the mine. In such case the operating tenant should have a credit for necessary improvements made in the operation of the mine.[77] He will be responsible if by gross negligence he wastes or destroys the common property.[78] Tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property in the absence of a special agreement or mutual understanding.[79]

**§ 791. Leases, licenses and conveyances executed by one of several cotenants.**—Subject to the qualification that one tenant in common cannot prejudice the rights of his cotenants, he may transfer his rights to a stranger by sale, license, or lease of his interest.[80]

A lease or license given by one cotenant to a third person to extract ore from the common property extends only to the interest of the granting cotenant.

[77] Wolfe v. Childs, 42 Colo. 121, 126 Am. St. Rep. 152, 94 Pac. 292, 294; Stickley v. Mulrooney, 36 Colo. 242, 87 Pac. 547, 548.

[78] Graham v. Pierce, 19 Gratt. (Va.) 28, 100 Am. Dec. 658, 14 Morr. Min. Rep. 308. See, also, Huff v. McDonald, 22 Ga. 131, 68 Am. Dec. 487, 14 Morr. Min. Rep. 262; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649, 14 Morr. Min. Rep. 271.

[79] Wolfe v. Childs, 42 Colo. 121, 126 Am. St. Rep. 152, 94 Pac. 292, 294.

[80] Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 860, 47 L. R. A. 540, rehearing denied, 60 Pac. 983.

He cannot bind a dissenting tenant,[81] for he can grant no greater right than he himself possesses.

One tenant in common cannot convey his right to any specified portion of the premises, or any right in such portion, or the right to dig ores therefrom. Such conveyance is void as to the cotenants, though good as against the grantors.[82]

This rule does not obtain in Ohio, Virginia, California, or Missouri, and the modern tendency seems to be toward the adoption of the view of the latter state courts to the effect that such grants are valid, but subject to the contingency of being divested by a partition of the common property.[83]

In a conveyance by one tenant in common of his estate in the land, a reservation of his interest in the mines in and upon the land granted is void;[84] but one may convey his entire interest without the consent of the others, and the others have no right to participate in the sale unless by special agreement; and one may purchase the interest of another without consulting the remaining cotenants not parties to the trans-

[81] Omaha & Grant S. & R. Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925, 927, 5 L. R. A. 236, 16 Morr. Min. Rep. 184.

[82] Boston Co. v. Condit, 19 N. J. Eq. 394, 14 Morr. Min. Rep. 301; Marsh v. Holley, 42 Conn. 453, 14 Morr. Min. Rep. 687; Hartford v. Miller, 41 Conn. 112, 3 Morr. Min. Rep. 353; Wright v. Kaynor, 150 Mich. 7, 113 N. W. 779, 782; Eason v. Weeks (Tex. Civ. App.), 104 S. W. 1070.

[83] Stark v. Barrett, 15 Cal. 361, 370; Gates v. Salmon, 35 Cal. 576, 588, 95 Am. Dec. 139; Lessee of White v. Sayre, 2 Ohio, 110; Prentiss' Case, 7 Ohio, 129; Robinett v. Preston's Heirs, 2 Rob. (Va.) 278; Barnhart v. Campbell, 50 Mo. 597; Freeman on Cotenancy, 2d ed., §§ 201–204; Emeric v. Alvarado, 90 Cal. 444, 456, 27 Pac. 356, 359; Middlecoff v. Cronise, 155 Cal. 185, 189, 17 Ann. Cas. 1159, 100 Pac. 232, 234.

[84] Adams v. Briggs Iron Co., 7 Cush. (Mass.) 361; but see *contra*, City of New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753, 754.

action, and the purchase will in no sense inure to the benefit of the latter.[85]

Where a lessee of an undivided interest in mining property is excluded by his lessor's cotenants, he is entitled to his appropriate remedy.[86] On the other hand, he may himself occupy and use the common property, subject to exactly the same limitations, immunities and liabilities as apply to an occupying cotenant.[87]

**§ 792. Partition of mining property.**—Mining claims may be partitioned between cotenants the same as other real property, although the fee of the land may reside in the general government.[88]

When we say that mining property held in common may be partitioned, it is, of course, implied that the tenancy in common may be severed by an actual partition among the parties entitled, and by a division

[85] Bissell v. Foss, 114 U. S. 252, 262, 5 Sup. Ct. Rep. 851, 29 L. ed. 126; Charles v. Eshleman, 5 Colo. 107, 2 Morr. Min. Rep. 65; First Nat. Bank v. Bissell, 4 Fed. 694, 700, 2 McCrary, 73; Harris v. Lloyd, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736, 738.

[86] Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 860, 60 Pac. 983, 47 L. R. A. 540.

[87] *Ante*, §§ 789a, 790; Mercur v. State Line & S. R. Co., 171 Pa. 12, 32 Atl. 1126; Barnum v. Landon, 25 Conn. 137, 14 Morr. Min. Rep. 250; Hartford v. Miller, 41 Conn. 112, 3 Morr. Min. Rep. 353; Tipping v. Robbins, 71 Wis. 507, 37 N. W. 427; Freeman on Cotenancy, 2d ed., § 253.

[88] Hughes v. Devlin, 23 Cal. 501, 505, 12 Morr. Min. Rep. 241; Gillett v. Gaffney, 3 Colo. 351; Sears v. Taylor, 4 Colo. 38, 5 Morr. Min. Rep. 318; Filmore v. Reithman, 6 Colo. 120; McKeon v. Bisbee, 9 Cal. 137, 162, 70 Am. Dec. 642, 2 Morr. Min. Rep. 309; Watts v. White, 13 Cal. 321, 323, 13 Morr. Min. Rep. 11; Merritt v. Judd, 14 Cal. 59, 64, 6 Morr. Min. Rep. 62; Lowe v. Alexander, 15 Cal. 297, 302; Spencer v. Winselman, 42 Cal. 479, 482, 2 Morr. Min. Rep. 334; Dall v. Confidence S. M. Co., 3 Nev. 531, 93 Am. Dec. 419, 11 Morr. Min. Rep. 214; Aspen M. & S. Co. v. Rucker, 28 Fed. 220, 222. *Contra:* Strettell v. Ballou, 9 Fed. 256, 257, 3 McCrary, 46, 11 Morr. Min. Rep. 220.

of the tract into segregated parcels, "quantity and quality relatively considered," where the nature of the deposits is such as to make such actual partition feasible or possible, or by a sale when such partition cannot be effected without serious detriment to the interest of the cotenant.

It has been said that the only partition that can be made of this class of property is to order a sale, and divide the proceeds.[89]

It is undoubtedly true that an actual division of a mine can rarely be made without doing a possible injustice to some one of the cotenants. Generally partition proceedings must result in a sale.[90]

While in case of placers, oil claims, superficial deposits, or coal-beds, where the ownership is disconnected with extralimital easements, such as water rights, rights of way, and the like, the court may be able to determine the probable value of an entire tract and the uniformity in the grade of the deposits, so as to effect an equitable actual partition, yet we apprehend that the instances are rare.[91]

In the case of lodes and veins, it would seem impossible to effect a fair, actual division. It is a matter of common knowledge that the metallic substances occur-

[89] Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263, 5 Morr. Min. Rep. 67.

[90] Aspen M. & S. Co. v. Rucker, 28 Fed. 220, 223; Manley v. Boone, 159 Fed. 633, 636, 87 C. C. A. 197, citing among other cases, Brown v. Challis, 23 Colo. 145, 46 Pac. 679, 680; Hall v. Vernon, 47 W. Va. 295, 81 Am. St. Rep. 791, 49 L. R. A. 464, 34 S. E. 764, 765.

[91] Cecil v. Clark, 47 W. Va. 402, 81 Am. St. Rep. 802, 35 S. E. 11; Hall v. Vernon, 47 W. Va. 295, 81 Am. St. Rep. 791, 49 L. R. A. 464, 34 S. E. 764, 765. The question of partibility of lands containing oil and natural gas was discussed in Dangerfield v. Caldwell, 151 Fed. 554, 558, 81 C. C. A. 400, and they were there held to be not partible. The same question was reviewed but not decided in Musick Consolidated Oil Co. v. Chandler, 158 Cal. 7, 109 Pac. 613.

ring in veins are not distributed uniformly, either as to quantity or quality. They are found in "shoots," vugs, kidneys, and other irregular bodies, making it impracticable to segregate the interests without great injury to the owners.[92]

The frequent occurrence of faults and dislocations, the alternate disappearance and recurrence of the ore bodies, so as to render their continuance in a particular direction extremely uncertain, are all elements which are proper subjects for the consideration of a court when actions of this character are brought, logically forcing the conclusion that allotments in severalty would result injuriously to the owners or some of them.[93]

Theoretically a mine may be partitioned. Practically it cannot be, but a sale must ordinarily result.

As an abstract proposition of law, a sale of a mine cannot be ordered in a partition suit, except in those cases where a partition would be manifestly injurious to the interests of cotenants.[94] The general rule as to partition is stated as follows: The land should be partitioned in kind unless such partition cannot be made without great prejudice to the owner. The courts favor a partition in kind where it is practicable, and this for the reason that the owners should not be deprived of their title through a sale unless such sale is necessary to prevent great prejudice to the owners.

[92] Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 860, 60 Pac. 983, 47 L. R. A. 540. For an instance where the court held that an actual partition could be made of a lode claim, see Ryan v. Egan, 26 Utah, 241, 72 Pac. 933. As to a placer claim, see Manley v. Boone, 159 Fed. 633, 636, 87 C. C. A. 197.

[93] Coleman v. Coleman, 19 Pa. 100, 57 Am. Dec. 641, 11 Morr. Min. Rep. 183; Conant v. Smith, 1 Aikens (Vt.), 67, 15 Am. Dec. 669, 11 Morr. Min. Rep. 199.

[94] Dall v. Confidence S. M. Co., 3 Nev. 531, 93 Am. Dec. 419, 11 Morr. Min. Rep. 214.

In recent cases the matter is one of discretion in the trial court.[95]

Whether or not a partition can be made without great prejudice to the owners is a question of fact, the decision of which is not aided by judicial notice of any fact or circumstance not proved;[96] and where a sale is sought, the burden is upon the party urging it, to show the facts upon which an order of sale may be made, the presumption being that an actual partition may be had,[97] but the burden of overthrowing this presumption in the light of authorities is by no means onerous.

The right of partition may be maintained only by those occupying the legal relationship of joint tenants, tenants in common, or coparceners. The owner of an incorporeal hereditament or servitude in gross, such as a mining right to enter upon and occupy the ground for the purpose of extracting the minerals, cannot maintain partition as against the owners of the soil. The minerals and ores, so long as they remain in place, unworked and unsevered, are incapable of allotment according to quality and quantity relatively considered.[98]

It has been held that parties may, by contract, waive the right of partition and create a permanent tenancy in common which would prevent a severance of interests, such a covenant being one running with the land.[99]

A parol partition, executed by the parties taking actual exclusive possession of the portions respectively

[95] Muller v. Muller, 14 Cal. App. 347, 112 Pac. 200.

[96] Mitchell v. Cline, 84 Cal. 409, 418, 24 Pac. 164, 166; Musick Consolidated Oil Co. v. Chandler, 158 Cal. 7, 109 Pac. 613, 615.

[97] Freeman on Cotenancy and Partition, § 537, and cases cited; Ryan v. Eagan, 26 Utah, 241, 72 Pac. 933, 934.

[98] Smith v. Cooley, 65 Cal. 46, 48, 2 Pac. 880, 881; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394, 14 Morr. Min. Rep. 301.

[99] Coleman's Appeal, 62 Pa. 252, 14 Morr. Min. Rep. 221.

assigned to them in pursuance of the agreement to partition, which partition and possession are acquiesced in by the parties, is valid, and upon such partition the parties cease to be tenants in common.[100]

[100] 420 M. Co. v. Bullion M. Co., 3 Saw. 634, Fed. Cas. No. 4989, 11 Morr. Min. Rep. 608; Freeman on Cotenancy and Partition, § 398.

# CHAPTER II.

## MINING PARTNERSHIPS.


§ 796. Nature of relationship.
§ 797. Mining partnership—How created.
§ 798. Special instances wherein mining partnerships held to be created.
§ 799. Special instances where mining partnerships held not to be created.
§ 800. Rights and obligations of mining partners *inter sese*.
§ 801. Authority of the members —Liability of copartnership to third parties.
§ 802. Partnership property.
§ 803. Dissolution.


**§ 796. Nature of relationship.** — Where several owners unite and co-operate in working a mine, they form what is termed a mining partnership,[1] which is governed by many of the rules relating to an ordinary partnership, and also by some rules peculiar to itself.[2]

The distinctive features of mining partnerships are,—

(1) The absence of the *delectus personae*, which characterizes ordinary partnerships;

(2) Neither death nor bankruptcy of one of the members dissolves it;

(3) A sale of an interest in a mining partnership by a partner does not dissolve the partnership; such stranger by his purchase becomes a partner. Hence its membership is changeable and uncertain. This

[1] Lindley on Partnership, 2d Am. ed., 332; Howard v. Luce, 171 Fed. 584, 585; Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195, 197.

[2] Kahn v. Central Smelting Co., 102 U. S. 641, 645, 26 L. ed. 266, 11 Morr. Min. Rep. 540; Skillman v. Lachman, 23 Cal. 199, 203, 83 Am. Dec. 96, 11 Morr. Min. Rep. 381; Daily v. Fitzgerald (N. M.), 125 Pac. 625, 631. Mr. Bates, in his work on Partnership (§ 14), characterizes a mining partnership as "a cross between a tenancy in common and regular partnership."

naturally flows from the absence of the *delectus personae*.[3]

The origin of this species of limited partnerships may be traceable to the early periods of mining in the west, and while it has been the subject of legislation in some of the states in recent years,[4] such legislation is but little more than declaratory of the rules announced by the courts as governing the relation under what may be termed the American common law of mining partnerships.[5]

In some of its aspects the relationship resembles that arising under the cost-book system prevalent in Cornwall and Devonshire, but in America the law has

[3] Lamar v. Hale, 79 Va. 147; Jones v. Clark, 42 Cal. 180, 193, 11 Morr. Min. Rep. 473; Kahn v. Central Smelting Co., 102 U. S. 641, 645, 26 L. ed. 266, 11 Morr. Min. Rep. 540; Bissell v. Foss, 114 U. S. 252, 260, 5 Sup. Ct. Rep. 851, 29 L. ed. 126; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 686, 9 L. R. A. 455; Charles v. Eshleman, 5 Colo. 107, 2 Morr. Min. Rep. 65; Harris v. Lloyd, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 735, 736; Boucher v. Mulverhill, 1 Mont. 306, 12 Morr. Min. Rep. 350; Taylor v. Castle, 42 Cal. 367, 370, 11 Morr. Min. Rep. 484; Patriek v. Weston, 22 Colo. 45, 43 Pac. 446; Nisbet v. Nash, 52 Cal. 540, 550, 11 Morr. Min. Rep. 531; Congdon v. Olds, 18 Mont. 487, 46 Pac. 261; Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777, 34 S. E. 828, 829; Thomas v. Hurst, 73 Fed. 372, 373; Slater v. Haas, 15 Colo. 574, 22 Am. St. Rep. 440, 25 Pac. 1089, 1090; G. V. B. M. Co. v. First Nat. Bank of Hailey, 95 Fed. 35, 38, 35 C. C. A. 510; Hartney v. Gosling, 10 Wyo. 346, 98 Am. St. Rep. 1005, 68 Pac. 1118, 1122; Freeman v. Hemenway, 75 Mo. App. 611; Bentley v. Brossard, 33 Utah, 396, 94 Pac. 736, 743; Kelley v. McNamee, 164 Fed. 369, 374, 22 L. R. A., N. S., 851, 90 C. C. A. 357; Loy v. Alston, 172 Fed. 90, 92, 96 C. C. A. 578; McNamee v. Williams, 3 Alaska, 470; Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413, 414; Daily v. Fitzgerald (N. M.), 125 Pac. 625, 631.

[4] Montana, Civ. Code, §§ 3350–3359; Rev. Code 1907, §§ 5535–5544; California, Civ. Code, §§ 2511–2520; Idaho, Rev. Stats., §§ 3300–3309; Civ. Code 1901, §§ 2774–2784 (these statutes are counterparts of each other); Rev. Codes 1907, §§ 3361–3372; Nevada, Comp. Laws, §§ 468–480; Id. (1900), §§ 2773–2785.

[5] Congdon v. Olds, 18 Mont. 487, 46 Pac. 261, 262; G. V. B. M. Co. v. First Nat. Bank of Hailey, 95 Fed. 35, 38, 35 C. C. A. 510.

grown up out of the necessities of the miners; and mining partnerships, as a distinctive class, possessing peculiar attributes, have, by common consent, been recognized. They have become "second nature" to mining enterprises.[6]

As was said by Justice Field:—

> Mining partnerships as distinct associations, with different rights and liabilities attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them, successful mining would be attended with difficulties and embarrassments greater than at present.[7]

This class of limited partnerships has always been recognized in England, where the rules governing them are similar to those established in this country, making some slight allowance for difference in environment.

**§ 797. Mining partnership—How created.**—A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.[8]

[6] Kahn v. Old Tel. M. Co., 2 Utah, 174, 218, 11 Morr. Min. Rep. 645.

[7] Kahn v. Central Smelting Co., 102 U. S. 641, 645, 26 L. ed. 266, 11 Morr. Min. Rep. 540.

[8] Skillman v. Lachman, 23 Cal. 199, 203, 83 Am. Dec. 96, 11 Morr. Min. Rep. 381; Dougherty v. Creary, 30 Cal. 290, 300, 89 Am. Dec. 116; 1 Morr. Min. Rep. 35; Duryea v. Burt, 28 Cal. 569, 577, 11 Morr. Min. Rep. 395; Settembre v. Putnam, 30 Cal. 490, 493, 11 Morr. Min. Rep. 425; Stuart v. Adams, 89 Cal. 367, 372, 26 Pac. 970, 971; Manville v. Parks, 7 Colo. 128, 2 Pac. 212, 214; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232, 237; Nolan v. Lovelock, 1 Mont. 224, 9 Morr. Min. Rep. 360; Santa Clara M. Assn. v. Quicksilver M. Co., 8 Saw. 330, 17 Fed. 657, 659; Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777, 34 S. E. 828, 829; Hartney v. Gosling, 10 Wyo. 346, 98 Am. St. Rep. 1005, 68 Pac. 1118, 1121; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937, 938; Hawkins v. Spokane Hydraulic Min. Co., 2 Idaho, 970, 3 Idaho, 241,

It does not arise from mere cotenancy.[9]

But where cotenants join in the working of a mine, a partnership results. It is, however, not essential that all the cotenants join in the working to constitute such partnership; it may exist as to some of the cotenants and not as to the others.[10]

An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation of a mining partnership.[11]

Persons jointly conducting a mining venture are partners, though there is no express agreement for a partnership.[12]

A partnership may be formed by verbal agreement to acquire title by location to public mineral lands; but to create a partnership in working the mines not even this is necessary.

Such contracts are not within the statute of frauds.[13]

28 Pac. 433; Marks v. Gates, 2 Alaska, 519; Nielsen v. Gross, 17 Cal. App. 74, 118 Pac. 725, 726.

9 Tuck v. Downing, 76 Ill. 71, 7 Morr. Min. Rep. 83; First Nat. Bank of Hailey v. G. V. B. M. Co., 89 Fed. 449, 452; S. C., on appeal, 95 Fed. 35, 35 C. C. A. 510; Hartney v. Gosling, *supra;* Madar v. Norman, 13 Idaho, 585, 92 Pac. 572, 573; Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195.

10 Madar v. Norman, 13 Idaho, 585, 92 Pac. 572, 573.

11 Manville v. Parks, 7 Colo. 128, 134, 2 Pac. 212, 216; Hawkins v. Spokane Hydraulic Min. Co., 2 Idaho, 970, 3 Idaho, 241, 28 Pac. 433, 434; Bentley v. Brossard, 33 Utah, 396, 94 Pac. 736, 743.

12 Snyder v. Burnham, 77 Mo. 52, 15 Morr. Min. Rep. 562; Duryea v. Burt, 28 Cal. 569, 11 Morr. Min. Rep. 395; Freeman v. Hemenway, 75 Mo. App. 611; Kirchner v. Smith, 61 W. Va. 434, 11 Ann. Cas. 870, 58 S. E. 614, 618; Bentley v. Brossard, 33 Utah, 396, 94 Pac. 736, 743; Dale v. Hodge (Dale Goldenrod Min. Co.), 110 Mo. App. 317, 85 S. W. 929.

13 Moritz v. Lavelle, 77 Cal. 10, 11, 11 Am. St. Rep. 229, 18 Pac. 803, 804, 16 Morr. Min. Rep. 236; Murley v. Ennis, 2 Colo. 300, 12 Morr. Min. Rep. 360; Lawrence v. Robinson, 4 Colo. 567, 12 Morr. Min. Rep. 387; Meagher v. Reed, 14 Colo. 335, 9 L. R. A. 455, 24 Pac. 681, 685; Hirbour v. Reeding, 3 Mont. 15, 11 Morr. Min. Rep. 514; Shea v. Nilima, 133 Fed. 209, 213, 66 C. C. A. 263; Cascaden v. Dunbar, 157 Fed. 62, 84

The relationship arises from the ownership of the shares and the joint working of the mine for the purpose of extracting the minerals therefrom.[14]

But with the cessation of work, without an agreement to resume, the partnership ceases and the parties are thereafter only tenants in common.[15]

What is a partnership, is a question of law. Its existence in a given case, however, is a question of fact, depending for its solution upon inferences to be drawn from the evidence adduced.[16]

Of course, general partnerships may be formed for the purpose of mining; but we are concerned only with the special class distinctively known as mining partnerships.

**§ 798. Special instances wherein mining partnerships held to be created.**—An agreement between one or more persons who claim an undeveloped mine and another person, that if the latter will devote his labor and skill in exploring and developing the mine, the former will furnish him with tools and provisions and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits

C. C. A. 466; Whistler v. MacDonald, 167 Fed. 477, 481, 93 C. C. A. 113; Hendrichs v. Morgan, 167 Fed. 106, 108, 92 C. C. A. 558. See, also, Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195. *Contra:* Craw v. Wilson, 22 Nev. 385, 40 Pac. 1076, 1077.

[14] Anaconda C. M. Co. v. Butte & B. M. Co., 17 Mont. 519, 43 Pac. 924, 925; Prince v. Lamb, 128 Cal. 120, 60 Pac. 689, 691; Hartney v. Gosling, 10 Wyo. 346, 98 Am. St. Rep. 1005, 68 Pac. 1118, 1121; Madar v. Norman, 13 Idaho, 585, 92 Pac. 572; Loy v. Alston, 172 Fed. 90, 92, 96 C. C. A. 578.

[15] Harris v. Lloyd, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736, 741; Nielsen v. Gross, 17 Cal. App. 74, 118 Pac. 725.

[16] Hurd v. Tomkins, 17 Colo. 394, 30 Pac. 247, 248; Caley v. Coggswell, 12 Colo. App. 394, 55 Pac. 939, 940; Shea v. Nilima, 133 Fed. 209, 66 C. C. A. 263. See, also, Costello v. Scott, 30 Nev. 43, 93 Pac. 1, 7, 94 Pac. 222.

by the parties after development, constitute a mining partnership.[17]

The verbal conveyance of one-third interest in a mining claim by a party who retains the other two-thirds, the purchaser agreeing to pay the price therefor out of the product of the property, the working of all parties together in developing the mine, a time-book being kept in which were entered the wages due to each party, and the payment of sums of money by the purchaser agreeable to the contract, are facts sufficient to make out a mining partnership.[18]

Where conveyances were made by the plaintiff, who was the owner of mining property, of an undivided two-thirds interest therein to defendant, who, in consideration thereof, agreed to cause such development work to be done as to put the property into a marketable condition, and to use his best endeavors to sell the property at the highest price obtainable, bearing all expenses of development and of negotiating a sale and to pay the plaintiff one-third of the gross proceeds upon a sale, a partnership relation is created between the plaintiff and defendant in respect to the property which was the subject of the enterprise.[19]

A contract between three persons to operate a mining property as a company creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of the enterprise; and this notwithstanding the fact that such contract provides that there shall be no division of the profits between the parties until two of them are reimbursed therefrom, for the money expended in

17 Settembre v. Putnam, 30 Cal. 490, 493, 11 Morr. Min. Rep. 425.

18 Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. 318, 321.

19 McIntosh v. Perkins, 13 Mont. 143, 32 Pac. 653, 656.

the purchase of two-thirds of the property from the other one, and the cost of improving the same.[20]

Such a partnership may exist as well where the parties have an interest in the working of the mine in carrying on mining operations as where they own the mine itself.[21]

A contract between persons engaged in extracting ore from a mine and a person operating a concentrating mill whereby the former agree to furnish ore for concentrating and the latter agrees to concentrate the same, the expenses both of extracting and milling the ore and the profits from the sale thereof to be divided proportionately, constitutes a mining partnership.

A subsequent verbal agreement that the person operating the mill should receive a certain price for each ton of ore concentrated, to be paid from the proceeds of the ore, he to pay the rental of the mill, repairs, and improvements, does not prevent the parties being partners; neither does an agreement that one of the parties shall ship the ore after concentration, receive the proceeds, and pay out the money under the direction of another partner who was to manage the mine.[22]

A party, by an instrument in writing, contracted to purchase from the owners certain undivided interests in mining property. Subsequently, by oral agreement, he obligated himself to furnish money to carry on exploitation. It was held that the deed and contract were admissible in evidence for the purpose of showing that a mining partnership existed between him and the co-owners of the mine, and further that to-

[20] Bybee v. Hawkett, 12 Fed. 649, 655, 11 Morr. Min. Rep. 594.

[21] Manville v. Parks, 7 Colo. 128, 2 Pac. 212, 214; Haskins v. Curran, 4 Idaho, 573, 43 Pac. 559, 561; Bentley v. Brossard, 33 Utah, 396, 94 Pac. 736, 743; Walker v. Bruce, 44 Colo. 109, 97 Pac. 250, 251; Howard v. Luce, 171 Fed. 584, 585.

[22] Ashenfelter v. Williams, 7 Colo. App. 332, 43 Pac. 664, 666.

gether with other circumstances there was sufficient evidence to establish such partnership relation.[23]

Where the name of one of the actual lessees was omitted from a lease of coal land, but it was understood that such omitted party had a quarter interest, and he participated in the work under an agreement to share profits and losses, it was held to clearly establish a mining partnership.[24]

Again, it has been held that where some agree to furnish the money and others to do the work, and all share equally, it is a mining partnership.[25]

Also, where the evidence showed that there was an express agreement between the parties that they should hold and work mining claims for their joint use and benefit and where some work was in fact done upon the property, a mining partnership was held to be established.[26]

**§ 799. Special instances where mining partnerships held not to be created.**—No mining partnership or co-ownership exists between the owners of a mine and the holders of a deed from them, intended as security for indebtedness, where the holders of the deed are not in possession, and are interested in the work only as creditors, although it is agreed between them and the owner of the mine that all gold produced as the result of mining operations is to be received and retained by the creditors, and that the profits are to be applied toward payment of the indebtedness secured by the deed.[27]

[23] Perkins v. Peterson, 2 Colo. App. 242, 29 Pac. 1135, 1136.

[24] Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034.

[25] Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735; Costello v. Scott, 30 Nev. 43, 93 Pac. 1, 7, 94 Pac. 222.

[26] Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540, 541.

[27] Chung Kee v. Davidson, 102 Cal. 188, 36 Pac. 519, 521.

There is no element of a mining partnership where the contract alleged is one of hiring, to procure and work a mine for the defendant, upon the payment of wages and giving of an interest in the mine, in addition to wages conditioned upon its being found to be a paying mine.[28]

An agreement for an interest in the profits of a mining venture as a means of compensation only does not constitute a partnership.[29] It is simply a contract for working the mine on shares.[30]

So where there was some evidence that one who had negotiated the sale of a lease was to have an interest in lieu of commission, and who worked upon the property as a common miner but had nothing to do with the management, and no claim had ever been made against him for his share of the losses, his action for wages could not be defeated on the ground of partnership.[31]

In the case of Vietti v. Nesbitt,[32] the defendants with others were the owners of a mine, which was being worked by the plaintiff under an agreement that the ore extracted should be worked in a mill belonging to the defendants, and the proceeds divided as follows: The defendants were to be paid twenty-five dollars per ton for the milling, the plaintiff was then to be paid the expense of extracting the ore, and the balance was to be divided equally between him and the owners of the mine. It was held that these parties were simply tenants in common of the ore and its proceeds, and no partnership existed between them.

[28] Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802, 803.

[29] Butler v. Hinckley, 17 Colo. 523, 527, 30 Pac. 250, 252; Stevens v. McKibbin, 68 Fed. 406, 411, 15 C. C. A. 498.

[30] Stuart v. Adams, 89 Cal. 367, 26 Pac. 970, 971.

[31] Caley v. Coggswell, 12 Colo. App. 394, 55 Pac. 939, 940.

[32] 22 Nev. 390, 41 Pac. 151, 152.

A recorded agreement between a mining corporation and private parties, in which it was agreed that the corporation should convey an undivided one-half of the mining property to the private parties, when they had expended ten thousand dollars in developing and improving the property, but that the corporation should not be liable for any debts incurred in developing and improving the property, taken in connection with the fact that the corporation never held itself out as a partner of the private parties, does not constitute a partnership, even though the corporation was to share in contingent profits with the private parties.[33]

Where two persons entered into an agreement to engage together in a mining venture under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine and paid a note given in the firm name for a portion of the price,—*held*, that the contract was one of partnership in the ordinary sense, as distinguished from a "mining partnership," and that either partner had the same authority to bind the firm as if it were an ordinary trading partnership.[34]

The mere fact that parties make a contract associating themselves together for the purpose of mining falls far short of fixing their relation as mining partners.[35] If by the terms of a contract of mining partnership it appears that the confidential relation of an ordinary partnership is established, and that the firm is not subject to the intrusion of other partners at will, the reason of the rule that restricts the powers of a single partner fails. The parties are strictly partners,

[33] Horton v. New Pass G. & S. M. Co., 21 Nev. 184, 27 Pac. 376, 377.

[34] Decker v. Howell, 42 Cal. 636, 641, 11 Morr. Min. Rep. 492.

[35] Kimberly v. Arms, 129 U. S. 512, 530, 9 Sup. Ct. Rep. 355, 32 L. ed. 764; Daily v. Fitzgerald (N. M.), 125 Pac. 625, 630.

not by reason of their common ownership of the mine, but as a result of their own agreement.[36]

Under the provisions of the California code, no mining partnership is created where certain parties furnish a man with a "grubstake" to enable him to go to Alaska to prospect for and locate mining claims, they to have a half interest in such claims and in any mineral produced in a year therefrom, less expense of mining. Such an agreement is at most an executory contract to form a future partnership, there being no partnership property and no transaction of partnership business. Specific performance of such a contract was refused upon the statutory grounds of inadequacy and unreasonableness.[37]

Another somewhat similar case arose where several parties "grubstaked" a man to go to Alaska to prospect for mines on shares. His authority to *work* such mines was not clearly proved. When his funds were exhausted he borrowed money for further prospecting and sought to make his associates in the contract liable as partners. It was held that there was no such partnership relation as would confer upon the prospector an implied power to bind his associates in the debt contracted.[38]

Members and stockholders of a mining corporation, who voluntarily contribute funds for the purpose of operating the corporate property, upon an understanding that such contributions are to be repaid to them out of first earnings, do not become partners.[39]

[36] Decker v. Howell, 42 Cal. 636, 641; Daily v. Fitzgerald (N. M.), 125 Pac. 625, 630.

[37] Prince v. Lamb, 128 Cal. 120, 60 Pac. 689, 691.

[38] Hartney v. Gosling, 10 Wyo. 346, 98 Am. St. Rep. 1005, 68 Pac. 1118, 1121.

[39] Dodge v. Chambers, 43 Colo. 366, 96 Pac. 178, 180.

An agreement whereby a prospector undertakes to transfer an undivided interest in claims previously located in consideration of the furnishing him with money and supplies necessary to develop them is neither a partnership nor a grubstake contract, but merely creates a tenancy in common in such claims.[40]

A contract whereby the owner of an undivided interest in a mine agrees to convey to another by quitclaim deed one-half of his interest in such mine in consideration of the payment of a specified sum per linear feet for a tunnel already under construction, coupled with a further stipulation that from then on the contracting parties will pay equally from the breast of the tunnel, does not of itself establish a partnership in the absence of other facts showing a complete partnership relation.[41]

**§ 800. Rights and obligations of mining partners inter sese.**—In the conduct of the business for which a mining partnership is formed, the copartners owe to each other the same degree of fidelity, good faith, and fair dealing as is exacted from ordinary partners.[42]

The rule of *uberrima fides* is just as applicable to this class of partnerships as it is to those more general in their scope.

One member may not conduct operations to the detriment and disadvantage of his associates, or acquire for his own exclusive benefit property which rightfully belongs to the partnership;[43] but so far as

[40] Roberts v. Date, 123 Fed. 238, 242, 59 C. C. A. 242.

[41] Hatch v. Fritz, 48 Colo. 530, 111 Pac. 74, 76. For an interesting attempt to construct a mining partnership in reference to the famous Camp Bird mine at Ouray, Colorado, see Thompson v. Walsh, 140 Fed. 43.

[42] Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677, 678, 15 Morr. Min. Rep. 624.

[43] Kimberly v. Arms, 129 U. S. 512, 528, 9 Sup. Ct. Rep. 355, 32 L. ed.

the disposal of his own or the purchase of another's interest is concerned, where the partnership relation does not extend to selling the property, but only to developing and mining it, neither of the parties is under any legal obligation to consult with the others.

One may sell his interest to a stranger, and the latter becomes thereby a partner, whether the other copartners are willing or unwilling.[44]

In the absence of a special contract between tenants in common of mining property, who are partners only for the purpose of exploitation, there is no relation of trust which prevents one from receiving a higher sum for his interest than is paid to his co-owners; nor is the selling cotenant under any obligation to disclose to the others the fact that upon the sale of the entire property he is to receive a higher sum for his interest than the others.[45]

A purchase by one cotenant of the interest of another does not inure to the benefit of all the remaining tenants in common,[46] but a purchase under a trust deed or mortgage, made with partnership funds, will not divest the interest of any of the partners.[47]

In a mining partnership, the firm has no right of pre-emption as to the interests of retiring partners in the mine. Therefore, a tenant in common of mining property and a partner in the working of the mine can-

764; Continental Divide M. Co. v. Bliley, 23 Colo. 160, 46 Pac. 633, 634; Settembre v. Putnam, 30 Cal. 490, 495, 11 Morr. Min. Rep. 425.

[44] Nisbet v. Nash, 52 Cal. 540, 550, 11 Morr. Min. Rep. 531; Kahn v. Central Smelting Co., 102 U. S. 641, 645, 26 L. ed. 266; Bissell v. Foss, 114 U. S. 252, 260, 5 Sup. Ct. Rep. 851, 29 L. ed. 126; Kimberly v. Arms, 129 U. S. 512, 530, 9 Sup. Ct. Rep. 355, 32 L. ed. 764.

[45] Harris v. Lloyd, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736, 739.

[46] Bissell v. Foss, 114 U. S. 252, 260, 5 Sup. Ct. Rep. 851, 29 L. ed. 126.

[47] Brown v. Bryan, 6 Idaho, 1, 51 Pac. 995, 997.

not claim any benefit in the purchase of the interests of certain cotenants and retiring partners by other cotenants and partners.[48]

The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business. This rule is statutory in Montana,[49] California,[50] and Idaho.[51]

This has always been the rule in the absence of legislation; but, as was said by the supreme court of California,—

> The conduct of the partners holding the major portion of the property in a mining concern is to be most jealously scrutinized when complaint is made, by the minority in interest, of oppression. It might, and often would, work great inconvenience and damage to the minority in interest of a mining partnership, if the majority were allowed to do as they might deem to their own advantage, regardless of the rights and interests of the minority; but, notwithstanding the danger of the abuse of power in such cases, what may be necessary and proper for carrying on the business of mining for the joint benefit of all concerned must be determined by those owning and holding in the aggregate the major part of the property; and if the powers which are thus attempted to be exercised are not necessary and proper for the success of the enterprise, those whose interests are imperiled or disastrously affected thereby have the right to resort to the courts for redress and protection.[52]

[48] First Nat. Bank v. Bissell, 4 Fed. 694, 699, 2 McCrary, 73.

[49] Rev. Code of 1895, § 3359; Rev. Code 1907, § 5544.

[50] Civ. Code, § 2520.

[51] Rev. Stats., § 3309; Civ. Code 1901, § 2783; Rev. Code 1907, § 3370; Hawkins v. Spokane H. M. Co., 2 Idaho, 970, 3 Idaho, 241, 28 Pac. 433, 434.

[52] Dougherty v. Creary, 30 Cal. 291, 301, 89 Am. Dec. 116, 1 Morr. Min. Rep. 35.

As in the case of general partnership, the minority must be consulted. Any other course of proceeding on the part of the majority is not in good faith.[53]

Each member of a mining partnership has, for the debts due the creditors of the concern, and for moneys advanced for its use, a lien upon the partnership property which he may enforce in equity, even if there has been no agreement among the partners that such lien shall exist.[54] By statute in Montana, Idaho and California, the lien exists, although there may be an agreement that it shall not.

If a member of a mining partnership sells his interest, the purchaser takes subject to such lien. He is deemed to have purchased with notice of any lien resulting from the relation of the partners to each other and to the creditors of the partnership.[55] Such lien does not give to either partner a right of possession to the exclusion of the other; nor is it dependent upon possession.[56] As a matter of law, the possession of one partner is possession of all.[57]

An incoming partner takes subject to the payment of the antecedent partnership debts out of the partnership property,[58] although he may not be held liable personally for such debts.

So far as the creditor is concerned, the personal liability of the retiring partner continues, but such partner, in disposing of his interest, parts with his equity

[53] Lindley on Partnership, p. 600.

[54] Duryea v. Burt, 28 Cal. 569, 579, 11 Morr. Min. Rep. 395; Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777, 34 S. E. 828, 830. See, also, Greenlee v. Steelsmith, 64 W. Va. 353, 62 S. E. 459, 462.

[55] Duryea v. Burt, 28 Cal. 569, 586, 11 Morr. Min. Rep. 395.

[56] Morganstern v. Thrift, 66 Cal. 577, 6 Pac. 689, 690.

[57] Waring v. Crow, 11 Cal. 366, 371, 5 Morr. Min. Rep. 204; Patterson v. Keystone M. Co., 30 Cal. 360, 366.

[58] Jones v. Clark, 42 Cal. 180, 194, 11 Morr. Min. Rep. 473.

to have the partnership debts paid out of the partnership property.[59]

A location made by one partner after dissolution, upon a discovery of mineral indications made prior thereto, will not inure to the benefit of a former partner, unless failure to make location during the existence of the partnership was fraudulent.[60]

Where, after a verbal agreement to form a partnership to locate mines, locations are made by one of the parties to the agreement in his own name, such locations will inure to the benefit of the partnership, and will be decreed to be held in trust for the same.[61]

Where an agreement providing for the prospecting and location of mining claims for the benefit of all the parties thereto is dissolved by mutual consent, neither of the parties is under any obligation to the others to perfect locations commenced in pursuance of the agreement; and subsequent locations covering the same ground made by some of them are not held in trust for the others.[62]

**§ 801. Authority of the members—Liability of copartnership to third parties.**—In a limited sense each member of a mining partnership is the agent of the other.[63]

The powers of members and managers of such partnerships are limited to the performance of such acts in

[59] Id.

[60] Jennings v. Ricard, 10 Colo. 395, 15 Pac. 677, 680, 15 Morr. Min. Rep. 624. See, also, McGahey v. Oregon King M. Co., 165 Fed. 86, 93.

[61] Shea v. Nilima, 133 Fed. 209, 213, 66 C. C. A. 263; Hendricks v. Morgan, 167 Fed. 106, 108, 92 C. C. A. 558. See, also, Fox v. Gunn, 133 Fed. 131, 139, 66 C. C. A. 197.

[62] Page v. Summers, 70 Cal. 121, 12 Pac. 120, 121, 15 Morr. Min. Rep. 617.

[63] Abbott v. Smith, 3 Colo. App. 264, 32 Pac. 843, 846.

the name of the partnership as may be necessary to the transaction of the business, or which is usual in like concerns,[64] or, as we find the rule stated in Bainbridge,[65]—

> The limit of liability must, with respect both to the partners themselves and the public, be determined by the general usage of trade applicable to the particular branch of industry in which the society is engaged. An authority for one partner to bind another will, therefore, in all such cases be presumed to exist, so far as, by the general usage of persons engaged in similar pursuits, such an authority has been determined to be necessary for effectually conducting the business of the concern. In cases where usage may not have established any particular practice, or in which the custom may be doubtful, it will still be necessary to recur to the original principle upon which all customs are founded, viz., whether the act in question can be considered to be necessary for the efficient management of the concern.

One member of a partnership does not possess implied authority to bind the copartnership by a promissory note.[66]

This rule is based upon the reason that in such partnership there is no *delectus personae,* and that, consequently, the membership is continually subject to changes beyond the control of the partners;[67] nor may

[64] Charles v. Eshleman, 5 Colo. 107, 2 Morr. Min. Rep. 65, holding that employment of counsel to litigate the title to the mine does not come within the limited powers vested in a mining partner. Bentley v. Brossard, 33 Utah, 396, 94 Pac. 736, 743, explaining the distinction between general trading and mining partnerships as to authority of partners.

[65] 4th ed., p. 589.

[66] Manville v. Parks, 7 Colo. 128, 2 Pac. 212, 216; Skillman v. Lachman, 23 Cal. 199, 207, 83 Am. Dec. 96, 11 Morr. Min. Rep. 381; Congdon v. Olds, 18 Mont. 487, 46 Pac. 261, 262.

[67] Decker v. Howell, 42 Cal. 636, 641, 11 Morr. Min. Rep. 492; Duryea v. Burt, 28 Cal. 569, 579, 11 Morr. Min. Rep. 395.

one borrow money to carry on the business.[68] Yet, as an incident of such partnership, each has authority to bind others by dealing on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of such working,[69] and even where the partners have agreed amongst themselves to carry on the business on a cash basis, a loan negotiated by one and acquiesced in by the others becomes a valid partnership obligation.[70]

As mining operations cannot be conducted without the employment of labor, the firm would be responsible to employees hired by one of the partners.[71]

So with the purchase of supplies and articles necessary to carry on the business, the debt being contracted in the usual course of business and within the scope of the partnership venture.[72]

There is no implied authority to purchase land, and no obligation given by a member for the purpose of effecting such purchase can be enforced against the others;[73] but, of course, the rule is different where the partnership is an ordinary one, whose object is to purchase as well as to exploit mines, and where the element of *delectus personae* is present.[74]

It has been held that a mining partnership may, by its general practice and course of business, be held

[68] Hartney v. Gosling, 10 Wyo. 346, 98 Am. St. Rep. 1005, 68 Pac. 1118, 1121.

[69] Manville v. Parks, 7 Colo. 128, 2 Pac. 212, 216; Hartney v. Gosling, 10 Wyo. 346, 98 Am. St. Rep. 1005, 68 Pac. 1118, 1121.

[70] Randall v. Meredith (Tex.), 11 S. W. 170, 173; but see Randall v. Meredith, 76 Tex. 669, 13 S. W. 576, 582.

[71] Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53, 11 Morr. Min. Rep. 287; Nolan v. Lovelock, 1 Mont. 224, 9 Morr. Min. Rep. 360; Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735, 736.

[72] Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232, 237.

[73] Judge v. Braswell, 13 Bush (Ky.), 69, 26 Am. Rep. 185, 11 Morr. Min. Rep. 508.

[74] Decker v. Howell, 42 Cal. 636, 642, 11 Morr. Min. Rep. 492.

liable for acts which were not, strictly speaking, within the scope of such partnership; but this was based upon the principle that such conduct estops the partnership from repudiating obligations in favor of those who deal with it in the light of its customary practices. In other words, it was held that in thus dealing with third parties the partners may, by their acts in the ordinary conduct of their business, hold themselves out to be something more than mining partners.[75]

But the judgment in the case so holding was subsequently reversed and the doctrine seemingly repudiated.[76]

Where a third party seeks to charge the firm upon obligations incurred by one of its members, which obligations are beyond the scope of a mining partnership, it devolves upon the one seeking to enforce such obligations to show either that they were entered into under express authority, or that the acts by which they were incurred were usual and customary with the particular partnership in the ordinary conduct of its business.[77]

The recognized and established usage on the part of the firm should be taken as a part of the contract of partnership.[78]

Whatever authority may be exercised by a member of the firm may be exercised by its ostensible agents, such as managers and superintendents in charge of operations; but the exercise of this authority is sub-

[75] Randall v. Meredith (Tex.), 11 S. W. 170, 173.

[76] Randall v. Meredith, 76 Tex. 669, 13 S. W. 576, 582.

[77] Randall v. Meredith, 76 Tex. 669, 13 S. W. 576, 582; Judge v. Braswell, 13 Bush (Ky.), 69, 26 Am. Rep. 185, 11 Morr. Min. Rep. 508; Hartney v. Gosling, 10 Wyo. 346, 98 Am. St. Rep. 1005, 68 Pac. 1118, 1123.

[78] Taylor v. Castle, 42 Cal. 367, 371, 11 Morr. Min. Rep. 484.

ject to the same limitations as control the acts of individual members.[79]

This, of course, does not preclude the delegation to such agent of enlarged powers by the joint authority of all the partners, nor prevent the subsequent ratification by the partnership of an unauthorized act; and, by accepting the benefit of a contract unauthorized in its inception, and acquiescing in it to the extent of performing some of the obligations flowing from it, the partnership may be estopped from disputing its validity.[80]

These are familiar rules, applicable to all classes of partnership.

As in the case of general partnerships, the liability of a mining partner for the acts of his associates continues, after he sells his interest and retires from the firm, in favor of persons who have had dealings with, and given credit to, the partnership, until they have had actual personal notice of the dissolution.[81]

Constructive notice imparted by the recording of an instrument, by which the retiring partner disposes of his interest in the partnership, will not suffice.[82]

While the members of a mining partnership contribute to the expense of conducting its business, and participate in the profits of the venture in proportion to the amount of interests respectively held, it has been decided by the supreme court of California that, in

[79] Jones v. Clark, 42 Cal. 180, 191, 11 Morr. Min. Rep. 473; Stuart v. Adams, 89 Cal. 367, 26 Pac. 970, 971.

[80] Jones v. Clark, 42 Cal. 180, 191, 11 Morr. Min. Rep. 473; Randall v. Meredith (Tex.), 11 S. W. 170, 173, but see S. C., 76 Tex. 669, 13 S. W. 576, 582.

[81] Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727, 728; Kelley v. M'Namee, 164 Fed. 369, 374, 90 C. C. A. 357, 22 L. R. A., N. S., 851; McNamee v. Williams, 3 Alaska, 470.

[82] Id.

respect to the obligations of the copartnership, each is liable jointly with the others for the full amount of the indebtedness justly chargeable to the partnership, and not merely for a *pro rata* share.[83]

**§ 802. Partnership property.**—The mining ground belonging to and worked by a mining partnership, and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property;[84] in the absence of a special agreement, however, this will not include any property which is not actually worked or used in connection with such property.[85]

Where land is brought into a partnership as stock, it is, as between the partners, their creditors, and one who has knowingly dealt with them for it, personalty belonging to the firm.[86]

Real estate belonging to a partnership will, in equity, be treated like its personal funds and distributed accordingly. If the title stands in the name of one of the partners, he will be held as a trustee of the partnership and be made to account to the other partners according to their several rights and interests;[87] but it by no means follows that real estate used for partnership purposes is partnership property. A contrary presumption prevails when the title is not in the firm, and to rebut that presumption it must appear either that it was paid for with the firm money

[83] Stuart v. Adams, 89 Cal. 367, 26 Pac. 970, 971.

[84] Duryea v. Burt, 28 Cal. 569, 577, 11 Morr. Min. Rep. 395.

[85] Dorsey v. Newcomer, 121 Cal. 213, 53 Pac. 557.

[86] West Hickory M. Assn. v. Reed, 80 Pa. 38.

[87] Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24, 3 Morr. Min. Rep. 551; 1 Lindley on Partnership, 2d Am. ed., p. 332, note.

or was, by agreement, actually brought into the common stock.[88]

It is no unusual thing that property be used for partnership purposes and not belong to the partnership. It may belong either to a third person, to one of the partners, or to the partners as tenants in common.[89]

There may, indeed, be partnerships in the business of milling or mining or farming; but unless the intent of the joint owners to throw the real estate into the funds as partnership stock is distinctly manifested, or unless the real property is bought out of the social funds for partnership purposes, it must still retain the character of realty.[90]

The use to which the property is applied does not necessarily determine the question as to whether it is to be treated as personal or real estate, but the intention of the parties is the controlling element.[91] Such intention may be shown by parol. It may be manifested by the acts and declarations of the parties.[92]

It seems to be settled that the mere fact that property held by the firm as tenants in common is used in and for the partnership business, or a mere agreement to use it for partnership purposes, is not of itself sufficient to convert it into partnership stock. There must be some evidence of further agreement to make it partnership property.[93]

88 Shafer's Appeal, 106 Pa. 49, 55.

89 Grant v. Bannister, 160 Cal. 774, 118 Pac. 253, 256.

90 Wheatley's Heirs v. Calhoun, 12 Leigh (Va.), 264, 272, 37 Am. Dec. 654.

91 Holmes v. Self, 79 Ky. 297, 299; Alexander v. Kimbro, 49 Miss. 529.

92 Shafer's Appeal, 106 Pa. 49, 55.

93 Alexander v. Kimbro, 49 Miss. 529, 537. See Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195.

These principles are applicable to all classes of trading and commercial partnerships. That the same rules govern mining partnerships is quite apparent.

**§ 803. Dissolution.**—As one cotenant may not compel the others to join him in the working of the common property, when a copartnership does arise by a joint working, it may be terminated at will by either partner,[94] so far as the retiring partner is concerned. While the remaining cotenants may continue to operate the common property, subject to the rules announced in a preceding section, the withdrawing copartner is relegated to his position as tenant in common, with all the rights and privileges and subject only to such obligations as are incident to a tenancy in common, pure and simple.[95]

Neither of the cotenants can force the others to operate the property at a loss, or to continue a relationship which might be either unsatisfactory or, in the judgment of a withdrawing cotenant, inexpedient. Necessarily the dissatisfied partner must give to his associates fair and unequivocal notice of his withdrawal, and to protect himself from future liability as to creditors with whom the partnership had been theretofore accustomed to deal, a like notice to such creditors must be given.[96]

As a matter of course, such determination of the partnership cannot operate to defeat rights accrued under it while it is in force.[97]

[94] Lawrence v. Robinson, 4 Colo. 567, 12 Morr. Min. Rep. 387.

[95] Slater v. Haas, 15 Colo. 574, 22 Am. St. Rep. 440, 25 Pac. 1089; Madar v. Norman, 13 Idaho, 385, 92 Pac. 572, 573.

[96] Id.

[97] Lawrence v. Robinson, 4 Colo. 567, 12 Morr. Min. Rep. 387.

A silent withdrawal will not relieve a partner from liability for work done or debts contracted after such withdrawal.

Under ordinary circumstances, dissolution may be effected without resort to the courts. Thus dissolution may be effected by a cessation of work, without an agreement, express or implied, for resumption.[98]

When, however, the real property used for partnership purposes has, by the agreement or acts of the parties, been impressed with the character of partnership property, or brought into the common stock or treated as a partnership fund, there is no method of adjusting the equities of the partners if they are unable to reach an amicable agreement, except by an action for dissolution and accounting.[99]

When the relationship of the parties is that of a mining partnership only, neither the death of one of the partners nor the sale of his interest will dissolve it.[100]

The surviving partner has no right as survivor to take control of the property, this right only applying where the *delectus personae* exists.[1]

[98] Nielson v. Gross, 17 Cal. App. 74, 118 Pac. 725, 726.

[99] Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777, 34 S. E. 828.

[100] Kahn v. Central Smelting Co., 102 U. S. 641, 646, 26 L. ed. 266, 11 Morr. Min. Rep. 540; Taylor v. Castle, 42 Cal. 367, 370, 11 Morr. Min. Rep. 484; Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777, 34 S. E. 828, 829; Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413, 414.

[1] Jones v. Clark, 42 Cal. 180, 195, 11 Morr. Min. Rep. 473.

# TITLE IX.

## RIGHTS AND OBLIGATIONS OF PARTIES ENGAGED IN WORKING MINES.

CHAPTER

I. DRAINAGE OF MINES—RELATIVE RIGHTS AND DUTIES OF MINERS OPERATING AT DIFFERENT LEVELS, WITH RESPECT TO WATER.

II. MUTUAL RIGHTS AND DUTIES WHERE TITLE TO MINERALS IS SEVERED FROM THAT OF THE SURFACE.

III. LATERAL OR ADJACENT SUPPORT.

IV. DEPOSIT OF MINING DEBRIS IN RUNNING STREAMS AND ON LANDS OF OTHERS—PRIVATE NUISANCES.

V. GOVERNMENTAL SUPERVISION OF HYDRAULIC MINING IN CALIFORNIA—THE CALIFORNIA DEBRIS COMMISSION—ITS JURISDICTION AND POWERS.

# CHAPTER I.

## DRAINAGE OF MINES—RELATIVE RIGHTS AND DUTIES OF MINERS OPERATING AT DIFFERENT LEVELS, WITH RESPECT TO WATER.

§ 806. Introductory — Statutory regulations on the subject of mine drainage.
§ 807. The law of natural flow.
§ 808. Foreign water—Flooding.

**§ 806. Introductory—Statutory regulations on the subject of mine drainage.**—Many of the states of the Union have enacted laws upon the subject of mine drainage and the care of water encountered in the exploitation and development of mines. Some of these laws purport to authorize condemnation proceedings, whereby one mine owner may acquire easements through lands of others for the purpose of securing artificial outlets. In Massachusetts, Kentucky, Tennessee, Georgia, and North Carolina mining is considered and declared by statute to be a public use, and the right of eminent domain may be lawfully exercised for mining purposes.[1]

Colorado, Wyoming, and Arizona have statutes regulating the subject, the two former based upon provisions of their constitutions authorizing the legislative branch of the state government in the case of Colorado to make such regulations from time to time as may be necessary for the proper equitable drainage of mines,[2] and, in the case of Wyoming, to provide by law for the proper development, ventilation, drainage, and operation of mines,[3] and the latter[4] acting under

[1] *Ante*, § 19.

[2] Colo. Const., art. 16, § 3; Mills' Annot. Stats., §§ 3172–3180; Rev. Stats. 1908, §§ 4226–4234.

[3] Const., art. 9, § 2; Rev. Stats. 1899, § 2535.

[4] Ariz. Rev. Stats. 1887, §§ 2352–2357; Ariz. Rev. Stats. 1901, §§ 3252–3257.

the supposed authority granted by section twenty-three hundred and thirty-eight of the Revised Statutes of the United States.

We have heretofore treated of this class of legislation and its application to mining easements generally.[5]

There is another class of legislation, such as found in Pennsylvania,[6] providing for methods for the prevention of damage by releasing accumulated water through adits or drifts run under official supervision, which may fall within the police power of the state.

It is not our purpose to analyze these special laws. To some extent they embody the equitable principles established by the courts in the absence of any legislation. Where they go beyond these, they are not altogether free from constitutional objections.[7]

Our presentation of the subject is intended to be limited to the consideration of the equitable rules which guide the courts in defining the relative rights and duties of coterminous or adjacent mine owners in the care and discharge of percolating waters encountered in mining operations. These principles, generally speaking, will be found to be of universal application.

They are few and simple, are based upon rational and natural laws and the dictates of common sense. They are peculiar to no locality. While local subterranean conditions vary in a geological sense, water is encountered everywhere pursuing the same universal and unvarying natural laws until interfered with by the artificial devices of man. To recognize these natural forces is just as essential in the case of the under-

[5] *Ante*, §§ 252–264.

[6] Laws 1893, p. 52, art. 14, § 3.

[7] People v. Parks, 58 Cal. 624.

ground circulatory system as it is with surface flowage. The subject does not afford much latitude for judicial disagreement, and in the literature of this branch of jurisprudence we rarely encounter discordant decisions. The questions most likely to arise in any community where mining is carried on may be determined by reference to a few well-established maxims.

**§ 807. The law of natural flow.**—In conducting mining operations, water, as was said by Lord Tenterden,[8] is a sort of common enemy, against which each man must defend himself. Yet while this property right of defense is a natural one, it must be so exercised as not to endanger the lives or property of others.

Each mine owner has all the rights of property in his mine, and, among them, the right to extract all minerals therefrom, provided he works with skill and in the usual manner; and if, while the occupier of a higher level exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature.[9]

Land on a lower level owes a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down upon it.[10]

[8] Rex v. Pagham Commrs. of Sewers, 8 Barn. & C. 355, 108 Eng. Reprint, 1075.

[9] Baird v. Williamson, 15 Com. B., N. S., 376, 4 Morr. Min. Rep. 368. See Duff v. United States Gypsum Co., 189 Fed. 234, 235.

[10] Smith v. Kendrick, 7 Com. B. 515, 18 L. J. C. P., N. S., 172, 6 Morr. Min. Rep. 142; Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452, 15 Morr. Min. Rep. 695.

From the necessity of the case, every owner of a mine must submit to the inconvenience of having water of an adjoining mine upon a higher level descend upon his land so long as it descends in the natural course of drainage.[11]

If the owner of the servient heritage wishes to guard against this operation, he must leave barriers "to bay back the water of his higher neighbor."[12]

Otherwise the resulting damage, if any, is *damnum absque injuria;*[13] but the owner of the higher level has no right, by the use of artificial methods, to become an active agent in sending water into the mine of his lower neighbor. He is not authorized to interfere with its gravitation, so as to make it more injurious to the lower mine or disadvantageous to himself.[14]

> The rule defining the rights and liabilities of adjoining mine owners may be stated in this form: For damages resulting from natural causes or from lawful acts done in a proper manner, the law gives no redress; but where one of the two adjoining mine owners conducts water into his neighbor's mine which would not otherwise go there, or causes it to go there at different times and in larger quantities than it would go there naturally, he commits a wrong which the law will redress.[15]

Or, as stated in another form by Lord Hatherly, in Phillips v. Homfray,[16]—

11 Attorney General v. Council Birmingham, 4 Kay & J. 528, 70 Eng. Reprint, 220.

12 Baird v. Williamson, *supra;* Jegon v. Vivian, L. R. 6 Ch. App. 742, 8 Morr. Min. Rep. 628.

13 Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452, 15 Morr. Min. Rep. 695.

14 Baird v. Williamson, 15 Com. B., N. S., 376, 4 Morr. Min. Rep. 368.

15 Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452, 15 Morr. Min. Rep. 695.

16 L. R. 6 Ch. App. 770, 14 Morr. Min. Rep. 677.

> The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint as against the owner of the other mine. The owner of the upper mine has a right to work it just as he likes, and his neighbor below cannot complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement.

This is the rule as to surface drainage as between upper and lower proprietors.[17]

But where the owner of the lower mine seeks to protect himself from the flowage of water from the adjoining higher levels by means of natural barriers left standing in his own land, the upper owner will not be permitted to remove such barriers, so as to permit the water to flow into his neighbor's mine. While the higher proprietor has the right to extract all of his mineral up to the common boundary, and the lower must submit to the inconvenience of receiving the water into his mine which reaches it by natural gravitation, the former has no right to interfere with the lawful methods adopted by the owner of the lower level to protect his own property.[18]

After the removal by the higher proprietor of such a barrier, the duty is enjoined upon him of preventing the flow of the water into the mine of the lower owner.[19]

§ 808. **Foreign water — Flooding.**—In conformity with the rules announced in the preceding section, the owner of the upper mine will not be permitted to in-

[17] Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. 174, 176.

[18] Bannon v. Mitchell, 6 Ill. App. 17, 2 Morr. Min. Rep. 108.

[19] Firmstone v. Wheeley, 2 Dowl. & L. (Q. B.) 203, 12 Morr. Min. Rep. 76. See Clegg v. Dearden, 12 Q. B. 576, 8 Morr. Min. Rep. 88, 116 Eng. Reprint, 986.

troduce into the works of the lower proprietor foreign water which would not by gravitation flow into the works of the lower owner.[20]

This doctrine was applied by the supreme court of Pennsylvania to a case where the defendants, the owners of a coal mine, in working it removed the pillars which supported the roof. The superincumbent surface subsided, forming a catchment basin. The rains and melted snow penetrated into the defendants' mine through cracks and breaks in the basin, and thence flowed in great quantities into the plaintiffs' mines, which were lower than defendants'. The suit was by the plaintiffs to recover damages. The defendants pleaded, and supported the plea by evidence, that the flowing of the water into plaintiffs' mine was the result of the ordinary and proper working by defendants of their mine, and not the result of negligence or want of care. They also sought to establish the existence of a neighborhood custom which approved the removal of pillars without reference to its effect as to the sinking of the surface.

The appellate court affirmed the judgment which held the defendants liable, intimating that if the alleged custom existed, it would be unreasonable and would not furnish a ground of defense.[21]

Where the owner of the upper mine impounds water upon his premises by means of embankments or artificial reservoirs for his own convenience, it would

[20] Baird v. Williamson, 15 Com. B., N. S., 376, 4 Morr. Min. Rep. 368.

[21] Homer v. Watson, 79 Pa. 242, 21 Am. Rep. 55, 14 Morr. Min. Rep. 1. See Wilson v. Waddell, L. R. 2 App. Cas. 95, 14 Morr. Min. Rep. 25, where it was held that the owner of the upper level had a right to remove all the coal, and was not liable, if the surface subsided, for water introduced into the lower proprietor's mine through percolations from the artificial basin thus formed.

seem that he owes a duty to the lower proprietor to so construct his devices that they will withstand all pressure which may be reasonably anticipated.

In the leading case of Fletcher v. Rylands,[22] the extreme doctrine was announced by the English court of exchequer chamber that where such artificial reservoirs were subsequently discharged upon the lands of the lower proprietor, the liability of the owner upon the higher level for damages thus caused was absolute, and it was no defense to plead that the devices were constructed skillfully and properly, or that the discharge was not caused by his fault or negligence.

Said Justice Blackburn:—

> We think that the rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is, *prima facie,* answerable for all the damage which is the natural consequence of its escape. . . . . The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property; but for this act in bringing it no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mis-

[22] L. R. 1 Ex. 265.

chief may accrue, or answer for the natural and anticipated consequences; and upon authority, this, we think, is established to be the law, whether the things so brought be beasts or water or filth or stenches.

This doctrine was fully approved on appeal to the house of lords.[23]

In the later case of Fletcher v. Smith,[24] the correctness of the extreme doctrine was discussed. The facts were these: Fletcher's mine was on the higher, Smith's on the lower, level; Fletcher had diverted the course of a stream, and had made a new course for it; in working his mine he had occasioned certain portions of the surface to sink into holes, though in doing this he had not acted negligently. On the happening of a very heavy downfall of rain the water had overflowed its new course, got into the holes on the surface and passed into Fletcher's mine and thence flooded Smith's mine.

The jury having determined that the new channel by which the course of the stream was diverted was insufficiently constructed, Fletcher was held liable.

In the opinion of the court, by Lord Penzance, it was intimated that the doctrine of Fletcher v. Rylands (*supra*) was too broad, and that the proper rule would be one which would only require the defendant to construct the new course in a manner which would afford protection in any situation which might reasonably be expected to arise. The court, however, expressly declined to fix any specific rule, as, under the findings of the jury, the defendant had failed to meet even the mildest rule which had been suggested as applicable to the case.

[23] L. R. 3 H. L. 330.

[24] L. R. 2 App. Cas. 781. For decision of the court of exchequer, see L. R. 7 Ex. 305, 5 Morr. Min. Rep. 78.

In River Wear Commissioners v. Adamson,[25] it was said:—

> But the making of a reservoir is not itself a wrongful act, unless, as in Fletcher v. Rylands, it is on land the peculiar character of which allows the water to escape and do damage.

This suggestion seems to express the true test: that such care must be exercised as is in each case appropriate to the situation.[26]

In the American courts the English cases have been the subject of frequent quotation and analysis. The discussion has taken a very wide range between the *ultra* doctrine of the Rylands-Fletcher case and the more moderate one intimated in the Smith-Fletcher case.[27]

The commission of appeals for the state of New York held that Rylands v. Fletcher was in direct conflict with the law as settled in this country.[28]

In this conclusion the New Hampshire[29] and New Jersey courts[30] practically agree, whereas the supreme

[25] 26 W. R. 217.

[26] See, also, Nicholas v. Marsland, L. R. 10 Ex. 255; S. C., on appeal, 2 Ex. Div. 1, where Rylands v. Fletcher is differentiated and its doctrine limited.

[27] The American courts are not altogether agreed as to the true purport of the decision in this case, some of them insisting that it supports the radical doctrine of Rylands v. Fletcher; others, that it is authority for the relaxation of that rule, making the question of negligence in all cases the test of liability. Still others contend that Rylands v. Fletcher is authority only for the rule that the upper proprietor constructing artificial reservoirs is only *prima facie* liable, and that in cases of this character, the burden, which would ordinarily be cast upon the plaintiff to show negligence, is shifted to the defendant, who is compelled to prove affirmatively the exercise of care and diligence. As each case depends so much on the peculiar circumstances there arising, it is very difficult to evolve from the adjudicated cases a rule that is absolutely uniform.

[28] Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.

[29] Garland v. Towne, 55 N. H. 57, 20 Am. Rep. 164.

[30] Marshall v. Wellwood, 38 N. J. L. 339, 20 Am. Rep. 394.

court of Minnesota seems to accept the doctrine of that case as the correct one.[31]

The Minnesota case is a unique and interesting one, and arose out of the following state of facts:—

Hennepin Island divides the waters of the Mississippi river into two channels at the Falls of St. Anthony and above and below them, extending for about one thousand feet above and five hundred feet below. The bed of the river below is about thirty feet lower than the bed of the river above. A stratum of limestone, ten feet in thickness, forms the bed of the river above the falls, extends across the island and rests upon hard sand to the depth of the river below the falls. Cahill owned a leasehold estate of the island, and had constructed at the lower end a warehouse, mill and machinery.

Eastman excavated a tunnel, starting from the lower end of the island and traversing its entire length, penetrating for the distance of several hundred feet under the bed of the river above the upper end of the island. The tunnel was driven through the stratum of hard sand underlying the limestone, and at a vertical depth of more than thirty feet below the level of the bed of the river above the falls. Opposite Cahill's mill it was dug within seventy-five feet of the east shore, which was a steep perpendicular bank down to the bed of the river below the falls, and as low as the bottom of the tunnel.

The water of the river burst into the tunnel at its upper end, washed through it in great volume, filling it and rending the rocks and tearing away the ground on the top and sides of the tunnel for its entire length. Thereafter the flow of the water was temporarily

[31] Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184.

stopped, but later, and during the ordinary spring freshet, the water again burst into the tunnel, filling it, and washing through it with such volume and force that it washed out and undermined the lower end of the island and the land on which Cahill's mill and machinery stood. Hence the action. The court, in considering the case, examined it from the standpoint most favorable to the defendant, assuming that the tunnel was excavated with the utmost care and skill, and under the belief that it was perfectly safe. Eastman was held responsible upon the principle that by digging the tunnel he did an act which necessarily tended to injure Cahill, and that this liability existed without regard to the question of care and skill, following the doctrine announced in the Rylands-Fletcher case:—

> He had artificially caused foreign water to get into plaintiff's mine, water which did not arise there nor get there by merely natural means, water which got there, not by the defendants not preventing it, but by their causing it.

The following excerpts from the decisions of courts in other states of the Union illustrate the current of judicial thought.

Where one builds a mill dam on a proper model, and the work is well and substantially done, he is not liable to an action, though it break away, in consequence of which his neighbor's dam and mill below is destroyed. Negligence should be shown in order to make him liable.[32]

Each proprietor, in exercising his own rights in his own territory, shall act with reasonable skill and care

[32] Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623. See, also, Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Sheldon v. Sherman, 42 N. Y. 484, 1 Am. Rep. 569.

to avoid injury to others; and as an approximate rule for the measure of care and skill required, it shall be that degree of ordinary skill, care, and diligence which men of common and ordinary prudence, in relation to similar subjects, would exercise in the conduct of their affairs.[33]

The measure of care required in such a case is that which a discreet person would use if the whole risk were his own.[34]

The dam should be so constructed as to resist such extraordinary floods as might reasonably be expected to occur.[35]

One has a right to build a dam, and if in doing so he exercises ordinary care and skill, he will not be held liable for the consequences should it subsequently give way without his fault.

While it is customary for the owners of mines to keep them as free from water as practicable, yet they are not bound in law to do so. The only obligation resting upon them in such respect is that of self-interest. The upper owner may abandon his own mine whenever he pleases, notwithstanding his doing so may largely increase the flow of water into the mine below, and thereby greatly enhance the labor and expense of the owner in operating it. So the owner of a mine, for the purpose of protecting himself from the encroachments of water, which is regarded as the common enemy of mines and mining interests, may erect

[33] Inhabitants of Shrewsbury v. Smith, 12 Cush. (Mass.) 177.

[34] Todd v. Cochell, 17 Cal. 97, 98, 10 Morr. Min. Rep. 655; Hoffman v. Tuolumne County Water Co., 10 Cal. 413, 417; Wolf v. St. Louis Water Co., 10 Cal. 541, 544, 10 Morr. Min. Rep. 636; Campbell v. Bear River & Auburn W. & M. Co., 35 Cal. 679, 683, 10 Morr. Min. Rep. 656; Angell on Watercourses, § 336.

[35] Mayor of New York v. Baily, 2 Denio (N. Y.), 433, 441; Angell on Watercourses, § 366.

a dam or other structures on his own premises, if necessary for such purpose, subject to the limitation that such dam, or other structure, does not have the effect to collect from adjacent territory and eventually cast upon a lower mine water which, but for such dam or other structure, would not have reached it.[36]

What is and what is not *vis major*, or act of God, in a legal sense, which will relieve parties from liability for damages caused by discharge of artificially stored water, will depend largely upon the extent to which human agency negligently contributed to the catastrophe. The correct rule in this class of cases must be determined by a consideration of the general law of negligence.

Judge Thompson, in his work on this subject, has collated the authorities, both English and American, by reference to which the state of the law in the different jurisdictions may be fairly ascertained.[37]

[36] Jones v. Robertson, 116 Ill. 543, 56 Am. Rep. 786, 6 N. E. 890, 894, 15 Morr. Min. Rep. 703. As to measure of damages for flooding a mine, see Dalton v. Moore, 141 Fed. 311, 317, 77 C. C. A. 459.

[37] 1 Thompson on Negligence, notes, pp. 77–106.

# CHAPTER II.

## MUTUAL RIGHTS AND DUTIES WHERE TITLE TO MINERALS IS SEVERED FROM THAT OF THE SURFACE.

ARTICLE I. GENERAL PRINCIPLES—RIGHTS AND DUTIES OF MINE OWNERS —USE OF SURFACE.

II. VERTICAL OR SUBJACENT SUPPORT.

III. RIGHTS AND DUTIES OF SURFACE PROPRIETOR—OWNERSHIP OF SEPARATE STRATA.

## ARTICLE I. GENERAL PRINCIPLES—RIGHTS AND DUTIES OF MINE OWNERS—USE OF SURFACE.

§ 812. Application of the doctrine of the common law on the subject of severance —Severance under the federal law — General principles.

§ 813. To what extent owner of minerals may use surface—Ways of necessity.

§ 813a. Subsurface rights of owners of minerals—After removal of minerals.

§ 814. Manner of conducting mining operations.

**§ 812. Application of the doctrine of the common law on subject of severance—Severance under the federal laws—General principles.**—We have already observed that under the English law nothing was more common than to sell or demise a piece of land, excepting the mines. In like manner the different strata of the subsoil might be shown to be the subject of different rights; also that there might be in one mine different minerals which were the property of different persons. Thus one person might be entitled to the iron and another to the limestone. One seam or stratum of coal in the same lands might belong to a third person, and another distinct seam to a fourth owner. When the surface and underlying mines or the different strata of the subsoil were differently

owned, they were separate tenements, with all the incidents of separate ownership, a distinct possession and distinct inheritance,[1] and subject to separate taxation.[2]

When Lord Campbell, as chief justice of the queen's bench (1850), delivered the opinion in the leading case of Humphries v. Brogden,[3] he sought in vain among the law-writers of other nations for precedents touching questions arising out of the severance of the title to minerals from that of the surrounding soil.

Said that distinguished jurist:—

> We have attempted, without success, to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitude is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings, being peculiar to England.

After observing the absence of any suggestions on the subject in the civil law, he continues:—

> The American lawyers write learnedly on the support which may be claimed for land for lateral pressure, and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of lands may claim from the subjacent strata when possessed by another.

[1] *Ante*, § 9.

[2] Mound City B. & G. Co. v. Goodspeed G. O. Co., 83 Kan. 136, 109 Pac. 1002, 1004, 1 Water & Min. Cas. 244; Rockwell v. Warren Co., 228 Pa. 430, 139 Am. St. Rep. 1006, 77 Atl. 665, 666; Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 Pac. 483, 486, 20 L. R. A., N. S., 211.

[3] 12 Q. B. 739.

This "penury" of American legal literature upon this interesting subject was due solely to the lack of opportunity. Were Lord Campbell permitted to rewrite his decision in the light of the present exposition of the law in America, he would have no occasion to complain of the dearth of American precedents. Lord Campbell and his contemporary judges, in whose bosom rested the common law, had easy tasks compared with those assigned to some of our American judges half a century later.

Said Justice Paxson, speaking for the supreme court of Pennsylvania (1893) in Chartiers Block Coal Company v. Mellon:[4]—

> The discovery of new sources of wealth and the springing up of new industries (petroleum and natural gas) which were never dreamed of half a century ago, sometimes present questions to which it is difficult to apply the law as it has heretofore existed. It is the crowning merit of the common law, however, that it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise. This may be called the expansive property of the common law. Mining rights are peculiar, and exist from necessity, and the necessity must be recognized and the rights of mine and land owners adjusted and protected accordingly.

A few years after the decision by Lord Campbell we find the supreme court of Pennsylvania (1858) reiterating the doctrine of the common law:—

> Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man and the mineral right in another. It is not de-

[4] 152 Pa. 286, 34 Am. St. Rep. 645, 25 Atl. 597, 598.

nied, in such a case, that both are land owners, both holders of a corporeal hereditament.[5]

And in a comparatively recent case (1891) we find the same court announcing that—

> We have for nearly half a century judicially regarded the ownership of mineral, where it has been severed from the surface, as the ownership of land, to all intents and purposes.[6]

These rules prevail wherever in the United States conditions exist in an economic sense, making their application necessary.[7]

Where the title to the surface and underlying strata is in one person, who is not in actual possession, ad-

[5] Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760, 3 Morr. Min. Rep. 238.

[6] Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 1036, 13 L. R. A. 627. See, also, Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436, 1 Morr. Min. Rep. 189; Scranton v. Phillips, 94 Pa. 15, 14 Morr. Min. Rep. 48; Sanderson v. Scranton City, 105 Pa. 469; Delaware etc. R. R. Co. v. Sanderson, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394, 396; Morrison v. American Assn., 110 Va. 91, 65 S. E. 469, 470; Mound City B. & G. Co. v. Goodspeed G. & O. Co., 83 Kan. 136, 109 Pac. 1002, 1004, 1 Water & Min. Cas. 244; McBurney v. Glenmary Coal & Coke Co., 121 Tenn. 275, 118 S. W. 694, 698; Rockwell v. Warren Co., 228 Pa. 430, 139 Am. St. Rep. 1006, 77 Atl. 665. For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, 99 Pac. 483, 486, 20 L. R. A., N. S., 211; Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, 75, 2 L. R. A., N. S., 1115.

[7] Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350, 352, 16 Morr. Min. Rep. 253; Marvin v. Brewster, 55 N. Y. 538, 14 Am. Rep. 322, 13 Morr. Min. Rep. 40; Ryckman v. Gillis, 57 N. Y. 68, 15 Am. Rep. 464; Benavides v. Hunt, 79 Tex. 383, 15 S. W. 396, 398; Silva v. Rankin, 80 Ga. 79, 4 S. E. 756; Knight v. Indiana Co., 47 Ind. 105, 17 Am. Rep. 692; Arnold v. Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305, 1 Morr. Min. Rep. 176; Hartwell v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448, 3 Morr. Min. Rep. 229; Massot v. Moses, 3 S. C. 168, 16 Am. Rep. 697, 8 Morr. Min. Rep. 607. For a special discussion of the rules applicable to oil and gas, see *post*, § 862.

verse possession of the surface by another embraces in its scope everything to the center of the earth.

Actual possession of the surface carries with it the actual possession downward perpendicularly through the various strata.[8] On the other hand, where a severance of title has been effected, title to the mineral cannot be acquired by adverse possession to the surface, for such possession is not inconsistent with, nor hostile to, the title of the owner of the mineral estate. In other words, the general rule on this subject is that title to the freehold of either the surface or the minerals thereunder cannot be acquired by adverse possession of the other.[9]

> The possession of the holder of each estate is referable to his title. . . . . The owner of the surface can no more extend his possession of his own estate downward than the owner of the stratum can extend his possession upward, so as to give him title to the surface under the statute of limitations.[10]

The mere owner of, and in the possession of, the surface of land cannot, after a severance of the minerals in the land, maintain a suit to quiet title to the latter; but, on the other hand, the owner of the minerals may

[8] Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436, 1 Morr. Min. Rep. 189; Greenwich Coal & Coke Co. v. Learn, 234 Pa. 180, 83 Atl. 74.

[9] Morison v. American Assn., 110 Va. 91, 65 S. E. 469, 471. See, also, Gill v. Fletcher, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433, 436.

[10] Plummer v. Hillside Coal Co., 160 Pa. 483, 28 Atl. 853, 854; Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436, 1 Morr. Min. Rep. 189; Armstrong v. Caldwell, 53 Pa. 284, 13 Morr. Min. Rep. 252; Westmoreland etc. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 725, 29 Am. L. Reg. 93, 5 L. R. A. 731; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 34 Am. St. Rep. 645, 25 Atl. 597, 598; Murray v. Allred, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 360, 39 L. R. A. 249, 19 Morr. Min. Rep. 169; Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144, 145; McBurney v. Glenmary Coal & Coke Co., 121 Tenn. 275, 118 S. W. 694, 699; Morrison v. American Assn., 110 Va. 91, 65 S. E. 469, 470.

do so against the surface owner without being in possession.[11]

In order to claim minerals by adverse possession, after a severance from the surface ownership, the surface owner must show actual, notorious, exclusive, continuous, and peaceable possession of the mine, independently of his possession of the surface in the same manner as a stranger, such actual possession being shown by opening and operating the mine.[12]

The possession is continuous if the operation of the mine is carried on at such seasons as the nature of the work permits and the custom of the neighborhood requires, if there is some evidence of possession in the interval to connect the operation when resumed with prior operations.[13]

The owner of the mine does not lose his rights as against the owner of the surface by mere nonuser. His title can only be defeated by acts which actually take the mineral out of his possession.[14] In a very late case it is said that it is possible that adverse possession might be shown if a certain mine or quarry were surrounded on all sides with galleries and a defined area was so opened out. But, under ordinary circumstances, it is difficult to see how there can be adverse possession of so much of the mines or minerals as lie untouched in their bed.[15]

11 Farnsworth v. Barrett, 146 Ky. 556, 142 S. W. 1049, 1052.

12 Gordon v. Park, 219 Mo. 600, 117 S. W. 1163, 1166; Hooper v. Bankhead, 171 Ala. 626, 54 South. 549, 551; Gill v. Fletcher, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433, 435. See, also, Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 98.

13 Gordon v. Park, 219 Mo. 600, 117 S. W. 1163, 1166.

14 Gill v. Fletcher, 74 Ohio St. 295, 113 Am. St. Rep. 962, 78 N. E. 433, 435.

15 French v. Lansing, 73 Misc. Rep. 80, 132 N. Y. Supp. 523.

The doctrine of severance of title has been carried by the supreme court of Pennsylvania to what seems an unwarrantable conclusion. In Delaware and Hudson Canal Co. v. Hughes,[16] the plaintiff company had acquired title in 1825 to the surface and mineral of the so-called Porter tract of two hundred acres. In 1836 or 1837, the defendant's predecessor, McDonald, a laborer in the plaintiff company's mines, had entered upon and inclosed six acres of the tract and occupied it for his house and garden, upward of twenty-one years; his possession and that of his successors had been continued to the trial. The plaintiff company had continuously mined coal from other portions of the two hundred acre tract, but the defendant claimed the coal under his six acres, relying upon his title by adverse possession, coupled with the fact that the company had not engaged in mining anywhere within his boundaries. Under this state of facts it was held that by mining in the same seams of coal in other portions of the Porter tract, the company had effected a severance of its coal and surface titles; that although the defendant's predecessor had acquired an indefeasible title to the six acres of surface by adverse possession, such title and possession did not extend to the coal beneath, because of the so-called "severance."

We submit that severance of title, as known in the law, cannot exist where the surface and mineral title reside in the same individual. It would be, on its face, a contradiction of terms. It can only exist when, by grant, reservation, or otherwise, title to the surface is in one and title to the mineral is in another. That is what "severance of title" means. One who owns the entire title to the center of the earth cannot work

[16] 183 Pa. 66, 63 Am. St. Rep. 743, 38 Atl. 568, 569, 38 L. R. A. 826.

a severance thereof by choosing to regard the two component parts of the one title as severed. Such a result is brought about by a condition of things, and not by an operation of the mind. It is difficult to see how the act of the plaintiff company, in occupying a distant portion of the mineral estate, could have any different effect upon the balance of the mineral than its occupation of a distant portion of the surface would have upon the balance of the surface. In each instance it amounted to no more than constructive possession of the unoccupied portions. On the other hand, as neither the surface nor the mineral of the six acres was actually occupied by the plaintiff, McDonald's entry upon and actual possession of the surface was actual possession to the center of the earth. The decision of the Pennsylvania court would therefore seem to have the effect of allowing an actual possession to be overcome by a constructive possession.

In the mining regions of the west, where lands of the public domain are held under federal mining tenures, the subject of severance of title is not encountered as frequently as it is in the older states of the Union. As a rule the title emanating from the government carries the surface and all the minerals.[17] There are several instances, however, where the government itself has provided for the creation of such a severance:—

(1) In issuing patents to Mexican grants, under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, and Arizona;[18]

(2) In issuing patents to incorporated cities for townsites, under the act of March 3, 1891, recognizing

[17] *Ante*, § 80.
[18] *Ante*, § 127.

correlative rights of lode mining claimants and prior occupants of the surface;[19]

(3) Laws permitting entry of surface of public lands classified as coal, the government retaining the title to the coal for future disposal;[20]

(4) Issuing homestead and desert land patents, under the act of August 24, 1912,[21] on public lands in the state of Utah withdrawn or classified as oil lands, or lands valuable for oil, which patents reserve the oil and gas deposits therein to the United States;

(5) By granting a lode throughout its entire depth, although it may enter the land adjoining.[22]

As between private individuals, where a severance is created, it rarely happens that their mutual rights are not precise and ascertained by the deed by which the right to mines is acquired, and then the only question would be as to the construction of the deed, which may vary in each case.[23]

Be that as it may, whenever and wherever such a severance is effected, certain reciprocal rights and obligations arise between the two classes of owners, with reference to the manner in which the respective estates may be enjoyed.

It is necessary to briefly consider the nature and extent of these rights and obligations.

The underlying principles involved may be thus expressed: The proprietor of the minerals has a right

[19] *Ante*, § 172 (4).

[20] Act of March 3, 1909; 35 Stats. at Large, p. 844; Comp. Stats. (Supp. 1911), p. 613; Fed. Stats. Ann. (Supp. 1909) 563; Act of June 22, 1910, 36 Stats. at Large, p. 583; 1 Fed. Stats. Ann. (Supp. 1912) 317; Comp. Stats. (Supp. 1911), p. 614. These statutes are discussed *ante*, § 495a.

[21] 37 Stats. at Large, p. 496.

[22] *Ante*, § 568.

[23] Rowbotham v. Wilson, 8 H. L. Cas. 348, 360.

to win them. In exercising this right all privileges reasonably necessary for its full and fair enjoyment are necessarily implied; but these privileges must be exercised with due care and in a lawful manner, so as not to wantonly or unnecessarily interfere with the rights of the surface owner. The owner of the surface is subjected to such inconveniences as naturally flow from the severance of the underlying minerals and the incidents necessarily attaching to mineral ownership. To this extent the estate in the entire land, which originally was in one and the same person, has been lessened and burdened. The surface owner must exercise his rights in such a manner as not to wantonly or unlawfully impair the rights of the owner of the minerals or interfere with the necessary means by which they are won and brought to the surface.

**§ 813. To what extent owner of minerals may use surface.**—A grant of minerals implies the right to win them from the underlying soil. The use of some portion of the surface is necessary for the proper enjoyment of this right. To reach the minerals the miner must pass from the surface downward. To do this he has a right of way of necessity. He may sink through such land from the surface to the mines, in order to reach and work them.[24]

This way of necessity ought not to be of larger dimension than is reasonably requisite.[25]

[24] Wardell v. Watson, 93 Mo. 107, 5 S. W. 605, 606; MacSwinney on Mines, 372; Stewart on Mines, 33; Goold v. Gt. West Coal Co., 2 De Gex, J. & S. 600; Rogers v. Taylor, 1 Hurl. & N. 706; Turner v. Reynolds, 23 Pa. 199; Porter v. Mack Mfg. Co., 65 W. Va. 636, 64 S. E. 853, 854; Baker v. Pittsburgh C. & W. R. Co., 219 Pa. 398, 68 Atl. 1014, 1016. See, also, Neal v. Finley, 136 Ky. 346, 124 S. W. 348, 349.

[25] MacSwinney on Mines, 372; Monmouth Canal Co. v. Harford, 1 Cr. M. & R. 614, 634.

This right, however, cannot be extended to the use of other lands belonging to the grantee, for the purpose of transporting ore;[26] nor can it be asserted for any purpose not legitimately associated with the search for and extraction of the minerals.[27]

And it would seem that this right of surface user is not restricted by reason of the fact that the surface owner had granted a right of way for a tunnel, by means of which the ore could be removed from the mine.[28]

Where the instrument by which the title to the minerals is severed from that of the superjacent soil does not define the extent to which the grantee of the minerals may use the surface, he has a right to use so much of such surface as is strictly necessary and reasonable.[29] He cannot claim as an incident that which is simply convenient; he can only have, as to the surface, that which is necessary, but that which is necessary he may have in a convenient way.[30]

This involves the right to use such means and processes, for the purpose of mining and removing the minerals, as may be reasonably necessary in the light of modern invention and of the improvements in the arts and sciences.[31]

It includes the necessary ground for machinery for working the mine[32] and stowing the ore in its first

[26] Goold v. Gt. Western Coal Co., 2 De Gex, J. & S. 600. See, also, Webber v. Vogel, 159 Pa. 235, 28 Atl. 226, 227.

[27] Monmouth Canal Co. v. Harford, 1 Cr. M. & R. 614.

[28] Rankin's Appeal (Pa.), 16 Atl. 82, 85, 2 L. R. A. 429.

[29] Turner v. Reynolds, 23 Pa. 199.

[30] Marvin v. Brewster, 55 N. Y. 538, 14 Am. Rep. 322, 13 Morr. Min. Rep. 40; Porter v. Mack Mfg. Co., 65 W. Va. 636, 64 S. E. 853, 854.

[31] Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350, 352, 354, 16 Morr. Min. Rep. 253; Bainbridge, 4th ed., p. 208.

[32] Wardell v. Watson, 93 Mo. 107, 5 S. W. 605, 606.

marketable state, but not for the erection of smelting works, or accessories, for the purpose of treating the product, such as converting coal into coke or clay into brick.[33]

What improvements are reasonably necessary for the profitable and beneficial working of the mines is a question of fact to be determined from the evidence in each particular case.[34]

Where it is necessary to artificially store water as an adjunct to mining operations, a limited quantity of the surface may be devoted to that purpose.[35]

So a right of ingress and egress over the surface, to and from the necessary mine openings, for the purpose of transporting supplies, machinery, and the product of the mine, would be a way of necessity;[36] but the exercise of this right must be in the course least prejudicial to the owner of the surface.[37]

The acquisition and enjoyment of surface easements and rights of way for mining purposes other than those of necessity are the subject of private contract. The existence of such rights, as well as their proper measure, depends entirely upon the true interpretation of the instrument creating or reserving them.[38] With reference to proceedings *in invitum*, to condemn lands for such purposes under the eminent domain

[33] Bainbridge, 4th ed., p. 208; Marvin v. Brewster, 55 N. Y. 538, 14 Am. Rep. 322, 13 Morr. Min. Rep. 40; Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350, 354, 16 Morr. Min. Rep. 253; Dand v. Kingscote, 6 Mees. & W. 174.

[34] Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350, 354, 16 Morr. Min. Rep. 253.

[35] Dand v. Kingscote, 6 Mees. & W. 174.

[36] Clark v. Vermont & C. R. R. Co., 28 Vt. 103.

[37] Farnum v. Platt, 8 Pick. (Mass.) 339, 19 Am. Dec. 330, 8 Morr. Min. Rep. 330.

[38] See Brookshire Oil Co. v. Cannalia etc. Co., 156 Cal. 211, 103 Pac. 927, 928.

laws, we have endeavored in preceding sections[39] to explain what we conceive to be the state of the law, and have also noticed what easements were contemplated under the federal laws, subject to which mining rights upon the public domain are granted.[40] It is unnecessary to here recur to these subjects.

**§ 813a. Subsurface rights of owner of minerals, after removal of minerals.**—Where minerals have been severed from the surface ownership by a grant, the owner of the minerals has the absolute right to use the containing chamber, or space, or shell which is created by the removal of the minerals for any purpose and in any manner, subject to the surface owner's right to subjacent support.[41] Thus, he has the right to use the containing chamber as a thoroughfare for the carriage of minerals gotten out of adjoining land.[42]

If, instead of removing the inclosed minerals and then utilizing the space or shell thereby created, he prefers to cut a passage through those minerals for the express purpose of using it as a thoroughfare for the carriage of other minerals taken from adjoining land, he is entitled to do so.[43] He may use the underlying stratum of the containing chamber for drainage, support for tramways and the like.[44] These

39 *Ante*, §§ 252–264.

40 *Ante*, §§ 529–531.

41 MacSwinney on Mines, p. 67; Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 1038, 13 L. R. A. 627.

42 Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 1038, 13 L. R. A. 627; Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6, 8; Webber v. Vogel, 189 Pa. 156, 158, 42 Atl. 4, 19 Morr. Min. Rep. 639. See, also, Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 S. E. 195, 203.

43 MacSwinney on Mines, p. 67; Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 1038, 13 L. R. A. 627.

44 Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6, 8.

rights continue until all the minerals granted have been exhausted.[45]

**§ 814. Manner of conducting mining operations.**—The owner of a mine beneath the surface, though he have a right of way through the surface soil, has no right so to exercise the same as to interfere with the power of the owner of the land to make any lawful use thereof.[46]

He is bound to erect proper guards around his mine openings, so as to prevent them from being a source of danger to the cattle of the surface owner.[47]

He is not liable for any incidental damage necessarily occasioned by the ordinary and careful operation of his mine.[48]

The loss of springs to the owner of the surface by reason of the ordinary working of the mines does not render the owner of the minerals liable for damages.[49]

The value of springs, however, has been held to be a proper element in determining the damage to the surface land caused by subsidence.[50]

A mine owner is not responsible to the surface owner for disturbances caused by necessary blasting in the

[45] Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6, 8; Webber v. Vogel, 189 Pa. 158, 42 Atl. 4, 19 Morr. Min. Rep. 639.

[46] Park Coal Co. v. O'Donnell, 7 Leg. Gaz. (Pa.) 149.

[47] Williams v. Groncott, 4 B. & Sm. 149.

[48] Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350, 353, 16 Morr. Min. Rep. 253.

[49] Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93. See, also, Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511, 5 Morr. Min. Rep. 108; Trout v. McDonald, 83 Pa. 144, 9 Morr. Min. Rep. 32; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Sloss-Sheffield Steel & Iron Co. v. Sampson, 158 Ala. 590, 48 South. 493, 494.

[50] Rabe v. Schoenberger Coal Co., 213 Pa. 252, 62 Atl. 854, 855, 3 L. R. A., N. S., 782, 5 Ann. Cas. 216; Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 Atl. 545, 547.

mine;[51] but this necessarily implies that the blast must not be discharged in an improper or negligent manner.[52]

As heretofore noted, the miner is authorized to use such means and processes for the purpose of mining and removing the minerals as may be reasonably necessary in the light of modern invention and of the improvements in the arts and sciences.[53]

## Article II. Vertical or Subjacent Support.

§ 818. Right of surface support reserved by implication in grant of minerals—Nature of the right.
§ 819. Right an absolute one—Negligence not involved.
§ 820. Right limited to support of soil in its natural state—Buildings.
§ 821. Waiver or release of the right.
§ 822. Statutory regulations on subject of subjacent support.
§ 823. Remedies for surface subsidence—Statute of limitations.

**§ 818. Right of surface support reserved by implication in grant of minerals—Nature of the right.**—In every grant of mines there is an implied reservation of surface support.[54]

[51] Marvin v. Brewster, 55 N. Y. 538, 14 Am. Rep. 322, 13 Morr. Min. Rep. 40.

[52] Moody v. McDonald, 4 Cal. 297, 299, 2 Morr. Min. Rep. 187.

[53] Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350, 352, 354, 16 Morr. Min. Rep. 253.

[54] Proud v. Bates, 34 L. J. Ch. 406; Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242, 14 Morr. Min. Rep. 56; Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109, 14 Morr. Min. Rep. 32; Williams v. Hay, 120 Pa. 485, 6 Am. St. Rep. 719, 14 Atl. 379, 381; Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 Atl. 545, 547; Dignan v. Altoona Coal & Coke Co., 222 Pa. 390, 128 Am. St. Rep. 812, 71 Atl. 845, 846; Sloss-Sheffield Steel & Iron Co. v. Sampson, 158 Ala. 590, 48 South. 493, 494; Paull v. Island Coal Co., 44 Ind. App. 218, 88 N. E. 959, 960. *Contra:* Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, 26, 2 L. R. A., N. S., 1115, followed

There is a *prima facie* inference at common law upon every grant of minerals or other subjacent strata, where the surface is retained by the grantor, that the grantor in granting them does so in a manner consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma* and with the natural support which it possessed before the grant.[55]

The owner of the surface of land from which the title to the minerals has been severed has, in the absence of a contrary agreement, an absolute right to have it supported as it was in its original state, and one mining under it is answerable for damages arising from failure to properly support it, or from negligence

by federal court for same jurisdiction in Kuhn v. Fairmont Coal Co., 152 Fed. 1013, 1014, 179 Fed. 191, 192, 102 C. C. A. 457, 66 W. Va. 711, on the main ground that the Griffin case established a rule of property in the state of West Virginia. The supreme court of the United States held, however, that under the circumstances of the case the federal courts were called upon to determine the question, regardless of the decisions of the state courts. Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. Rep. 140, 54 L. ed. 228. Subsequently the circuit court of appeals gave its opinion adhering to the rule of the state courts. 179 Fed. 191, 102 C. C. A. 457, 66 W. Va. 711. For a criticism of the opinion in Griffin v. Fairmont Coal Co., see Paull v. Island Coal Co., 44 Ind. App. 218, 88 N. E. 959, 961.

[55] Dugdale v. Robertson, 3 Kay & J. 795, 13 Morr. Min. Rep. 662; Butterknowle Colliery Co. v. Bishop of Auckland etc., [1906] App. Cas. 305, 75 L. J. Ch. 541, 94 L. T. 795; Weaver v. Coal Co., 216 Pa. 195, 65 Atl. 545, 547; Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329, 333; Collins v. Gleason Coal Co., 140 Iowa, 114, 18 L. R. A., N. S., 736, 115 N. W. 497, 498; Paull v. Island Coal Co., 44 Ind. App. 218, 88 N. E. 959, 960; Catron v. South Butte Min. Co., 181 Fed. 941, 104 C. C. A. 405. *Contra:* Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, 26, 75, 2 L. R. A., N. S., 1115; Kuhn v. Fairmont Coal Co., 66 W. Va. 711, 152 Fed. 1013, 1014, 179 Fed. 191, 102 C. C. A. 457.

in conducting mining operations, or from both of these causes together.[56]

Of natural right the surface land is entitled to support from the strata below, and when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled to so much of the minerals as he can get without injury to the superincumbent soil.[57]

A grant or reservation of all and "every part of the mines and minerals in the land" in the strongest possible terms would not authorize the owner of the minerals to excavate without leaving proper support for the surface.

By reasonable intendment the grantee of minerals or the grantor of the surface reserving the minerals could only be entitled to so much of the mines below as would be consistent with the proper enjoyment of the surface.[58]

This rule obtains without reference to the nature of the strata or the difficulty of substituting artificial for natural supports or the comparative value of the surface and mineral.[59]

The mineral proprietor may substitute artificial supports in place of the ore removed, but being bound under the law to leave sufficient ribs or pillars to sup-

[56] Pringle v. Vesta Coal Co., 172 Pa. 438, 33 Atl. 690; Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329, 333.

[57] Coleman v. Chadwick, 80 Pa. 81, 87, 21 Am. Rep. 93; Jones v. Wagner, 66 Pa. 429, 434, 5 Am. Rep. 385, 13 Morr. Min. Rep. 690. See, also, Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666, 671.

[58] Horner v. Watson, 79 Pa. 242, 249, 21 Am. Rep. 55, 14 Morr. Min. Rep. 1 (citing Harris v. Ryding, 5 Mees. & W. 60); Mickle v. Douglas, 75 Iowa, 78, 39 N. W. 198, 199; Richards v. Jenkins, 18 L. T., N. S., 438.

[59] Lord Campbell in Humphries v. Brogden, 12 Q. B. 739; Horner v. Watson, 79 Pa. 242, 250, 21 Am. Rep. 55, 14 Morr. Min. Rep. 1.

port the soil,[60] he substitutes the artificial for the natural at his peril.

**§ 819. Right of surface support an absolute one—Negligence not involved.**—This right of subjacent support exists entirely independent of the question of negligence on the part of the mine owner.[61]

If subsidence is caused by not leaving sufficient support, it will be no defense that he worked the mines carefully and according to custom.[62]

The entire removal of the inferior strata, however skillfully done, if productive of damages by withdrawing that degree of support to which the owner of the surface was entitled is actionable, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.[63]

One who conveys land to another, reserving the right to remove the underlying coal, is bound to exer-

[60] 1 Thompson on Negligence, note 8, p. 280.

[61] Nelson v. Miller (Pa.), 1 Leg. Rec. 187; Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109, 14 Morr. Min. Rep. 32; Paull v. Island Coal Co., 44 Ind. App. 218, 88 N. E. 959, 960; West Pratt Coal Co. v. Dorman, 161 Ala. 389, 135 Am. St. Rep. 127, 49 South. 849, 850, 23 L. R. A., N. S., 805 18 Ann. Cas. 750; Southwest Missouri Ry. Co. v. Big Three Min. Co., 138 Mo. App. 129, 119 S. W. 982, 983.

[62] 1 Thompson on Negligence, note 8, p. 280 (citing Humphries v. Brogden, *supra*). See, also, Harris v. Ryding, 5 Mees. & W. 556; Proud v. Bates, 34 L. J. Ch. 406; Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242, 14 Morr. Min. Rep. 56; Southwest Missouri Ry. Co. v. Big Three Min. Co., 138 Mo. App. 129, 119 S. W. 982, 983; Collins v. Gleason Coal Co., 140 Iowa, 114, 115 N. W. 497, 498, 18 L. R. A., N. S., 736.

[63] Humphries v. Brogden, 12 Q. B. 739. See, also, Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722. As to liability of lessor of inferior strata for damage caused by removal of support by tenant working a mine, see Campbell v. Louisville Coal Co., 39 Colo. 379, 89 Pac. 767, 768, 10 L. R. A., N. S., 822; Peterson v. Bullion-Beck & Champion Min. Co., 33 Utah, 20, 91 Pac. 1095, 1096, 14 Ann. Cas. 1122.

cise care in the removal and, if necessary, to leave pillars to support the surface, although the reservation exempted him from liability by reason of "mining operations."[64]

The right of support is not affected by a provision in the deed that the minerals shall be mined and removed "with as little damage as possible to the surface."[65]

A neighborhood custom, by which the proprietor of the minerals was permitted to take out pillars and remove all supports, has been held to be unreasonable and void,[66] and is no defense to an action for damages, where the subsidence occurs through failure to support.

**§ 820. Right limited to the support of the soil in its natural state—Buildings.**—The right of subjacent support, in the absence of agreement, express or implied, is limited to the soil in its natural state. The owner of the minerals is not called upon to support superadded weight occasioned by the erection of buildings or superstructures.[67]

Although the mine owner is not bound to leave support more than sufficient to stay the surface, yet if a subsidence occur, the mere presence of the building will not prevent a recovery, unless it be shown that the subsidence would not have occurred without the aid of the buildings, and the mine owner will be liable for damage both to the building and to the land.[68]

[64] Livingston v. Moingona Coal Co., 49 Iowa, 369, 31 Am. Rep. 150, 10 Morr. Min. Rep. 696.

[65] Williams v. Hay, 120 Pa. 485, 6 Am. St. Rep. 719, 14 Atl. 379, 382.

[66] Hilton v. Lord Granville, 5 Q. B. 701.

[67] Rogers v. Taylor, 2 Hurl. & N. 828.

[68] Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242, 14 Morr. Min. Rep. 56; Hilton v. Lord Granville, 5 Q. B. 701. See, also, Gumbert v. Kilgove

**§ 821. Waiver or release of right of surface support.**—The owner of land may, in the instrument whereby he severs the title of the minerals from that of the overlying surface, waive or surrender this right of support,[69] and when there is such waiver or surrender, the miner may take out all the mineral, even though the surface fall in;[70] but it must clearly appear that the grantor, in conveying the minerals, has released his right to support. Such release will not be inferred from ambiguous clauses in the instrument.[71]

The right of surface support may be divested by grant to the party working the mineral, and the subsequent purchaser of the surface will take subject to such grant.[72]

And in case of leases, the terms of the lease may be such that the lessee is compelled to extract all the mineral, regardless of surface support.[73]

(Pa.), 6 Cent. Rep. 406; Humphries v. Brogden, 12 Q. B. 739; Hamer v. Knowles, 6 Hurl. & N. 454; Jeffries v. Williams, 5 Ex. 792, 20 L. J. Ex. 14; Hilton v. Whitehead, 12 Q. B. 734; Hunt v. Peake, 1 Johns. (Eng.) 705; Brown v. Robins, 4 Hurl. & N. 186; Backhouse v. Bonomi, 9 H. L. Cas. 503, 13 Morr. Min. Rep. 677; Bell v. Love, 10 Q. B. D. 547. But the doctrine of lateral or subjacent support does not apply to wells and springs fed by subterranean streams. Sloss-Sheffield Steel & Iron Co. v. Sampson, 158 Ala. 590, 48 South. 493, 494.

[69] Rowbotham v. Wilson, 8 H. L. Cas. 348; Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350, 352, 16 Morr. Min. Rep. 253; Smart v. Morton, 5 El. & Bl. (40 Eng. Eq.) 30, 13 Morr. Min. Rep. 655; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385, 13 Morr. Min. Rep. 690; Smith v. Darby, L. R. 7 Q. B. 716; Aspden v. Seddon, L. R. 10 Ch. App. Cas. 394. See, also, Butterly Company v. New Hucknall Colliery Co., [1910] App. Cas. 381, 79 L. J. Ch. 411, 102 L. T. 609, 26 T. L. 415.

[70] Scranton v. Phillips, 94 Pa. 15, 14 Morr. Min. Rep. 48.

[71] Robertson v. Youghiogheny R. Coal Co., 172 Pa. 566, 33 Atl. 706; Williams v. Hay, 120 Pa. 485, 6 Am. St. Rep. 719, 14 Atl. 379, 382.

[72] Smith v. Darby, L. R. 7 Q. B. 716; Williams v. Bagnall, 12 Jur. N. S. 987, 13 Morr. Min. Rep. 686.

[73] Shafto v. Johnson, 8 Best & S. 252.

**§ 822. Statutory regulations on subject of subjacent support.**—In some of the mining states legislation exists on the subject of subjacent support. Colorado has enacted the following provision:—

> When the right to mine is in any case separate from the ownership or right of occupancy to the surface, the owner or rightful occupant of the surface may demand satisfactory security from the miner, and if it be refused, may enjoin such miner from working until such security is given. The order for injunction shall fix the amount of the bond.[74]

Idaho,[75] Wyoming,[76] and the two Dakotas[77] have similar provisions. We are not aware that this class of legislation has been the subject of judicial investigation. It seems to us that such legislation is not altogether free from constitutional objections.

**§ 823. Remedies for surface subsidence—Statute of limitations.**—What remedy is available for an injury to the surface caused by the removal of the underlying support, and when a cause of action accrues therefor, are questions which must be referred to the nature of the right which has been infringed. Since 1861, it has been settled law in England that the owner of the mineral estate is entitled to remove all of it; that he can substitute artificial support in its place and

[74] Mills' Annot. Code, § 3159. Section 3139 of the same code is as follows: No person shall have the right to mine under any building or other improvement unless he shall first secure the parties owning the same against all damages, except by priority of right. Rev. Stats. 1908, § 4213.

[75] Civ. Code 1901, § 2571; Rev. Codes 1907, § 3214.

[76] Wyo. Laws 1888, p. 83; Rev. Stats. 1899, § 2537.

[77] N. D. Rev. Code 1899, § 1436; N. D. Rev. Codes 1905, § 1810; Dak. Comp. Laws 1887, § 2007; Grantham's Stats. of S. D. 1899, § 2666; S. D. Rev. Pol. Code 1903, § 2542.

that, even though he remove all the mineral and put nothing in its place to support the surface, no cause of action exists until the surface subsides or is disturbed to the injury of the owner. This is because such surface owner has no right to control the owner of the mineral in his enjoyment or disposition of his estate, but merely to be undisturbed in the enjoyment of his own property. A cause of action arises only when there is a concurrence of right in one and an infringement of such right by another. Consequently, the cause of action for a subsidence accrues, not when the mineral support is removed, but when such removal has resulted in an actual disturbance to and injury of the surface. The surface proprietor may therefore bring his action for such injury at any time within the statutory period after the injury to the surface occurs, irrespective of the date of the removal of the mineral. Moreover, a recovery for one such injury is no bar to subsequent actions for further injuries from the same physical cause.

Each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same.[78]

The clear weight of American authority is to the same effect.[79]

[78] Backhouse v. Bonomi, 9 H. L. Cas. 503, 13 Morr. Min. Rep. 677; Mitchell v. Darley Main Colliery Co., L. R. 14 Q. B. 125; Darley Main Colliery Co. v. Mitchell, L. R. 11 A. C. 127, overruling Lamb v. Walker, L. R. 3 Q. B. 389; Crumbie v. Wallsend Local Board, L. R. 1 Q. B. (1891) 503; West Leigh Colliery Co. v. Turnicliffe, 77 L. J. Ch. 102, [1908] App. Cas. 27, 98 L. T. 4, 24 T. L. 146, H. L. (E).

[79] Ludlow v. Hudson R. R. Co., 6 Lans. (N. Y.) 128; Smith v. Seattle, 18 Wash. 484, 63 Am. St. Rep. 910, 51 Pac. 1057, 1059; Lewey v. Fricke Coke Co., 166 Pa. 536, 45 Am. St. Rep. 684, 31 Atl. 261, 262, 28 L. R. A. 283; Bank v. Waterman, 26 Conn. 324; Church of Holy Communion v. Paterson Extension Co., 66 N. J. L. 218, 49 Atl. 1030, 1033; Delaware

The leading English case upon this subject[80] was referred to approvingly by the supreme court of Pennsylvania in the following words:—

> The removal of the supports might not be known to, or discoverable by, the owner of the surface until the subsidence revealed it; and unless the injury consequential to the trespass could be treated as creating a cause of action, in most cases redress for a substantial injury would be denied altogether.[81]

That court, however, has squarely repudiated the English doctrine in the late case of Noonan v. Pardee,[82] and now holds that the cause of action accrues when the support is removed and is barred after the lapse of six years from such removal. It is said by the Pennsylvania court that the adoption of any more onerous rule "would encourage the purchase of surface over coal mines for speculation in future lawsuits." In the course of the opinion we encounter the following seemingly inconsistent expressions:—

> A cause of action is that which produces or effects the results complained of.[83]
>
> If the cause of the injury was within six years, although at the date of the deed [to the plaintiffs] the damage was not susceptible of computation, yet afterward became so by the subsidence of the surface, their right to sue was then fixed, a right which, from the nature of the case, could not have had more

& H. Canal Co. v. Wright, 21 N. J. L. 469; Delaware & H. Canal Co. v. Lee, 22 N. J. L. 243; West Pratt Coal Co. v. Dorman, 161 Ala. 389, 135 Am. St. Rep. 127, 49 South. 849, 850, 27 L. R. A., N. S., 805, 18 Ann. Cas. 750.

80 Backhouse v. Bonomi, 9 H. L. Cas. 503.

81 Lewey v. Fricke Coke Co., 166 Pa. 536, 45 Am. St. Rep. 684, 31 Atl. 261, 262, 28 L. R. A. 283.

82 200 Pa. 474, 86 Am. St. Rep. 722, 50 Atl. 255, 256, 55 L. R. A. 410.

83 Noonan v. Pardee, 200 Pa. 474, 482, 86 Am. St. Rep. 722, 50 Atl. 255, 256, 55 L. R. A. 410.

than a doubtful existence before the actual damage occurred.[84]

When the right to sufficient support has been violated, the cause of action, it is true, arises, but the owner in possession when the consequences follow is the one who suffers. There may in the interval have been several owners, none of whom sustained damage except the last; he alone has the right to sue, because to him only has passed the right to enforce by suit the collection of a damage occurring during his possession. Until they actually occur no one can tell when they will occur, or that they ever will. Each grantee has the right to presume that the subjacent owner has performed his legal duty, and the price, while probably somewhat depreciated by the possible risk, is not fixed on a presumption that his land will subside because of any special failure in duty on the part of him who has taken out the coal.[85]

It is fair to infer that a conclusion beset with so many difficulties would hardly have been adopted by the court in the absence of what were deemed controlling considerations of public policy and expediency.

The decision aptly illustrates the wisdom and truth of what was said by Lord Cranworth:[86]—

I think the error in the view which has sometimes been taken upon this subject is this: It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth, his right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with, he has nothing of which to complain.

One of the grounds upon which the Pennsylvania supreme court based its decision was, that the owner

[84] Id., p. 485.

[85] Id., pp. 485, 486.

[86] Backhouse v. Bonomi, 9 H. L. Cas. 503.

of the surface was at all times entitled to go into the mines and see for himself whether or not sufficient support was being maintained. This, in our judgment, would afford but scant protection. Even if he could prove that the miner was removing so much of the mineral that the surface was in peril, the difficulty of which proof is apparent, we apprehend that he would be obliged to show further that the danger could not be removed by artificial means, and that he was bound to suffer irreparable damages before any court would allow an injunction.[87] After the mineral had been actually removed, his right of action, at best, would be one "which from the nature of the case could not have more than a doubtful existence before the actual damage occurred."[88]

Viewing the situation in all its aspects, we are forced to the conclusion that the surface owner's right is to have his *surface supported;* that so long as his surface is *in fact* supported,—that is, so long as it stands without actual subsidence or injury,—he has no cause of action. As said by Chief Justice Cockburn,—

> The act of the excavating owner is not tortious *in se;* it is tortious only when it produces, and it seems to me to follow logically, to the extent to which it produces, actual damage.[89]

The owner of the mineral estate is not liable to the surface proprietor for a subsidence caused by excavations made by his predecessor in title, although the

[87] Chicago & Alton R. R. Co. v. Brandau, 81 Mo. App. 1.

[88] Noonan v. Pardee, 200 Pa. 474, 485, 86 Am. St. Rep. 722, 50 Atl. 255, 256, 55 L. R. A. 410.

[89] This language occurs in the dissenting opinion by Cockburn, C. J., in Lamb v. Walker, L. R. 3 Q. B. D. 389, 402, which case was overruled in Darley Main Colliery Co. v. Mitchell, L. R. 11 A. C. 127, upon the grounds stated in dissenting opinion quoted.

damage does not occur until after such owner came into possession.[90] This results from the fact that, while the subsidence gives the cause of action, the reponsibility therefor attaches to him whose acts and omissions have brought about the mischief. There seems to be no duty resting upon the successor in interest to remove a source of danger which was created before his ownership began.

## Article III. Rights and Duties of Surface Proprietor—Ownership of Separate Strata.

§ 826. Responsibility of surface owner for injuries to miners' rights.

§ 827. Rights of access to lower strata—Reciprocal servitudes between owners of different strata.

**§ 826. Responsibility of surface owner for injuries to miners' rights.**—The owner of the surface owes the same duty to the owner of underlying mines as the latter owes to the former. The obligations are reciprocal. While the doctrine of absolute liability, independent of the elements of negligence announced in the English case of Rylands v. Fletcher, discussed in a preceding chapter under the subject of drainage,[91] has been modified by some of the American courts as between individuals whose estates are more or less removed from each other, yet when the special relationship of surface and mineral proprietor exists in the same tract, we think the rule of that case is fairly applicable.

[90] Greenwell v. Low Beechburn Coal Co., L. R. 2 Q. B. (1897) 165; Hall v. Duke of Norfolk, L. R. 2 Ch. D. (1900) 493.

[91] *Ante*, § 808.

The principle is aptly illustrated in the case of Bagnall v. L. & N. W. Railway Co., decided by the English court of exchequer.[92]

The plaintiffs owned and occupied a coal mine. The surface soil, as well as the coal below, formerly belonged to the same owner, but a railway company took the surface under the authority of a private act of parliament for their railway, and constructed it thereon.

The railway company removed the surface soil to a depth of twenty feet vertically over the plaintiff's coal mine to reach the level at which they laid their rails. The surface soil was clay, impervious to water; by removing it a porous rock was reached. On the occurrence of a freshet, the water, overflowing the banks of a neighboring brook, found its way by gravitation to the cut overlying the plaintiff's mine, and sweeping through the porous rocks, loosened them so that the surface subsided, causing the injury to the mine below. The railway company was held liable, the court also announcing that the reasoning applied to water other than that from the flood. Through no default of the plaintiffs the natural condition of things had been altered, and the railway company having failed to protect the mine by the maintenance of sufficient drains, it was mulcted.

This is but the application of the same principle which governs the duties of the mine owner in regard to surface support. Negligence is not a test of liability. As skillful and prudent working is no defense to the miner, where the surface subsides for lack of support, so the careful and ordinary use of the surface

[92] 7 Hurl. & N. 423; affirmed on appeal, 1 Hurl. & C. 544, 5 Morr. Min. Rep. 366.

will not excuse the surface owner if damage occurs to the underground workings through such use.

Mr. Wood, in his treatise on the Law of Nuisances,[93] draws the following conclusion from the adjudicated cases:—

The fact that the surface owner makes a lawful use of his premises, or uses it for one of the ordinary purposes of life, and is in the exercise of the highest care, will not excuse him if the consequences are wrongful to, and in contravention of, the rights of another.[94]

**§ 827. Right of access to lower strata—Reciprocal servitudes as between owners of different strata.**—A grant of minerals underneath a given surface does not divest the grantor of the ownership of anything underlying them; but how may he reach strata underlying a stratum conveyed to another? Having sold the mineral underlying the surface, is he to be forever barred from reaching his estate lying beneath it?

True, in most instances there would be but little inducement to reach it; but cases are by no means rare where, underlying a granted mineral zone, there are other zones of the same character, or even other deposits of a different nature, possessing economic value.

The foregoing questions were involved in a case of this character, decided by the supreme court of Pennsylvania,[95] the facts of which were as follows:—

[93] § 204.

[94] As to liability of owner as landlord for negligent acts of tenant in causing subsidence, see Campbell v. Louisville Coal M. Co., 39 Colo. 379, 89 Pac. 767, 768, 10 L. R. A., N. S., 822; Peterson v. Bullion-Beck & Champion M. Co., 33 Utah, 20, 91 Pac. 1095, 1096, 14 Ann. Cas. 1122.

[95] Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 34 Am. St. Rep. 645, 25 Atl. 597, 598.

The plaintiff owned the coal beneath the surface, having acquired it by deed, not only conveying all the coal, but also the mining rights and privileges, including the right to enter the mines and carry away all the coal, the right to make openings or entries, air-courses, watercourses, drainage and shafts, with right of ingress and egress for the purpose of making such openings, with right of way for taking such coal, or any other coal, through the entries, and also the right to use the surface of the land for the purpose of storing the coal and waste.

> The grantor, in conveying the coal with these privileges, reserved to himself no right, privilege, or easement in said coal, or any part thereof, and no right of way through said coal from the surface to obtain gas, or oil, or any other substance. It is not likely at the time the grant was made that it occurred either to the grantor or the grantee of the coal that underneath the latter there might lie another substance of perhaps greater value than the subject of the grant itself. . It now appears that the coal is underlaid with oil and gas-bearing sand, which can only be reached by sinking wells from the surface through the strata of coal. . . . . The surface owner made leases for oil and gas purposes, and the lessees began at once to drill.

Under this state of facts the coal company applied for an injunction to restrain the lessees from drilling any wells which would pass through the coal, basing its right to equitable relief upon two grounds: (1) That the defendants had no right to drill the wells; (2) That assuming that they had such an abstract right, it was impossible to so drill them as to allow the removal of all the coal without exposing the mine to leakage from gas from said wells and rendering the mine operations so hazardous as to greatly injure and

depreciate the value of the coal property, if not to wholly destroy it.

The court below refused the injunction, upon condition that the defendants should execute bonds indemnifying the coal company for any damage which might inure from the operation of sinking the wells and removing the oil and gas. This decision was based upon the theory that the owner of the surface has a right of way by necessity through the coal to reach his oil and gas lying beneath it.

The appellate court affirmed the ruling of the court below and dismissed the appeal, but not, as we shall hereafter observe, for the reasons given by the trial court. In the course of its opinion, which they say is one of "first impressions," the court, speaking through Mr. Justice Paxson, said:—

> Prior to the sale of the coal the estate of the surface owner reached from the heavens to the center of the earth. With the exception of the coal, his estate is still bounded by these limits. It is impossible for him to reach his underlying estate, except by puncturing the earth's surface and going down through the coal he has sold. While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature. Much of the confusion of thought upon this subject arises from a misapprehension of the character of this estate. We must regard it from a business use as well as a legal standpoint. The grantee of the coal owns the coal, but nothing else, save the right of access to it and the right to take it away. . . . . It is the grant of an estate which owes a servitude of support to the surface. When the coal is all removed, the estate ends, for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. . . . . It cannot be seriously contended that, after the coal is removed, the owner of the surface may

not utilize the space it occupied for his own purposes, either for shafts or wells to reach the underlying strata. The most that can be claimed is, that pending the removal his right of access to the lower strata is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching underlying strata, has no authority in reason, nor do I think in law.[96] The right may be suspended during the operation of the removal, to the extent of preventing any wanton interference with the coal mining, and for every necessary interference with it, the surface owner must respond in damages. The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense.

In the light of this reasoning, the conclusions reached by the majority of the court seem somewhat inconsistent. While in another portion of the opinion the court extols the "expansive property" of the common law, and its elastic susceptibility of application "to meet new questions as they arise," it declined to apply the common-law right of way of necessity over the surface to the facts of the case.

> While the right of the surface owner to reach, in some way, his underlying strata is conceded, it involves too many questions affecting the rights of property and of injury to the underlying strata to be settled by the judiciary.

[96] Id. The same court had previously said: "How could the defendant own the coal absolutely and not own the space it occupied? How is it possible to conceive of such a thing as ownership of the space independently of the coal?" Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 13 L. R. A. 627.

It then referred the matter to the legislature, but affirmed the ruling of the court below in refusing the injunction, on the ground that the coal company had not as yet sustained any irreparable damage by reason of the sinking of the wells, and it might never do so.

Mr. Justice Williams, in a specially concurring opinion, touched the key-note of the situation. Said Justice Williams:—

> I concur in the decree made in this case and in the opinion which so ably vindicates it, but I would go further. I would lay down the broad proposition that the several layers or strata composing the earth's crust are, by virtue of their order and arrangement, subject to reciprocal servitudes; and as these are imposed by the laws of nature, and are indispensable to the preservation and enjoyment of the several layers or strata, to and from which they are due, the courts should recognize and enforce them. As it now stands, the decree of this court recognizes the existence of a right of access existing in the nature of things, wholly independent of all statutory enactments, and yet refuses to enforce that right or regulate its exercise. It says to the owner of the lower estate: "You have an undoubted right of access to the layer of the earth's crust in which your wealth lies, but equity will not protect or aid you in its exercise. The owner of the intermediate stratum may sue you and recover damages from you for doing what it is your right to do, and a chancellor cannot hear your complaint or lift his hands to protect you until the legislature has provided him with ears and hands for that purpose." I would hold that the jurisdiction is as clear as the right of access; that the parties are in a court competent to deal with the whole subject, and that the decree of the court below should be affirmed for that reason and at the cost of the appellant.[97]

[97] Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 34 Am. St. Rep. 645, 25 Atl. 597, 600.

This concurring opinion "snaps like a whip." Its force and logic are irresistible. If it be true, and the court in this case so says, that each of the separate layers or strata becomes a subject of taxation, of encumbrance, levy and sale, precisely like the surface, why should the ownership of each successive strata not be clothed with the same attributes as surface ownership, and be invested with all things necessary or incident to the right of enjoyment?

Each overlying stratum would have the right of support from the lower;[98] all being under a common servitude to the surface owner, and each owner would owe a duty to the other to so conduct his operations as to not interfere with his over or underlying neighbor.

The suggestion that, the remedy of the parties being doubtful, relief should be sought from the legislature, is hardly practicable. If the right of access does not arise out of the very nature of the estate, or is not conceded by contract, it is difficult to conceive how, in Pennsylvania at least, the legislative branch can interfere. The supreme court of that state has determined that private property cannot be condemned for purpose of ways to be used as mere appurtenances to a mine.[99]

It seems to us that the opinion of Justice Williams heretofore quoted is unanswerable, and affords the only correct solution of the problem.

Where minerals are granted or reserved, it is to be presumed that they are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident.[100]

[98] Mundy v. Rutland, 23 Ch. Div. 81, 96; Dixon v. White, L. R. 10 App. Cas. 833, 842.

[99] *Ante*, § 261.

[100] Rowbotham v. Wilson, 8 H. L. Cas. 348, 360.

There is no substantial difference between a title by exception or reservation out of a grant and a title by direct grant of the same subject. The books make no distinction.[1]

[1] Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 13 L. R. A. 627; Marvin v. Brewster, 55 N. Y. 538, 14 Am. Rep. 322, 13 Morr. Min. Rep. 40.

# CHAPTER III.

## LATERAL OR ADJACENT SUPPORT.

§ 831. Introductory.
§ 832. General principles—Negligence as an element.
§ 833. Right limited to support of soil in its natural state.
§ 834. The right of lateral support as applied to mines worked by hydraulic process.

**§ 831. Introductory.**—The right of lateral or adjacent support is founded on the same general principles as that of vertical or subjacent support.[1] To what extent this right exists in connection with ownership of land used for mining purposes will be considered after we have outlined the general rules of law governing it. In comparing the adjudicated cases on the subject of vertical with those dealing with lateral support, we may observe some slight variations in the principles; but these, we think, are more apparent than real. A brief statement of the doctrine of adjacent support, considered in the light of adjudicated cases, will be serviceable. We would hardly be justified in investigating the subject exhaustively, for the reason that in prosecuting mining ventures it is relatively unimportant. When controversies do arise involving the question between two coterminous mining properties, where the right of adjacent support exists to any degree, we look for their solution to the decisions and treatises on the subject generally, seeking there analogies and applying them.

**§ 832. General principles—Negligence as an element.**—Every man has the natural right to the use of his land in the situation in which it was placed by

1 Stewart on Mines, p. 165; MacSwinney on Mines, p. 286.

nature, surrounded and protected by the soil of adjacent lots. When one adjoining owner removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil.[2]

> Few principles of law can be traced to an earlier or to a more constant recognition, through a long series of uniform and consistent decisions, than this.[3]

In the case of land which is fixed in its place, each owner has the absolute right to have the land remain in its natural condition, unaffected by any act of his neighbor; and if the neighbor digs upon or improves his own land so as to injure this right, the one injured may maintain an action against him without proof of negligence.[4]

The right of lateral support is an absolute one. The obligation to respect it is in no way affected by the question of negligence.

> If the owner of the adjoining land takes away the natural support it does not matter whether he acts with due care and is guilty of no negligence.[5]

With regard to the element of negligence, some confusion of thought has arisen by a failure to recognize the distinction between negligence *in law* and negligence *in fact*. Where a measure of duty is ordinary and reasonable care, it is a question of fact.

> In such cases the standard of duty is not fixed, but variable. . . . . When the standard shifts with the circumstances of the case, it is in its very nature in-

[2] Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623 (citing Farrand v. Marshall, 21 Barb. (N. Y.) 409).

[3] Foley v. Wyeth, 2 Allen (Mass.), 131, 132, 79 Am. Dec. 771.

[4] Chief Justice Gray in Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312, 14 Morr. Min. Rep. 37.

[5] Washburn on Easements, 4th ed., p. 582. See Victor M. Co. v. Morning Star M. Co., 50 Mo. App. 525.

> capable of being determined as a matter of law; . . . . but when the standard is fixed, when the measure of duty is defined by the law and is the same under all circumstances, its omission is negligence, and may be so declared by the court.[6]

There may be instances where this duty is not enjoined at all; but wherever it is enjoined, its standard and measure is fixed. If one may not excavate his land, so that, by using ordinary or even the highest degree of skill, he will be unable to prevent his neighbor's soil from being disturbed, the duty is enjoined upon him to refrain from excavating. If he violates this duty, he is guilty of negligence in law. If by the exercise of care he may remove his soil without disturbing his neighbor's, yet fails to exercise such care, he is guilty of negligence in fact. There may be a shade of difference in the legal principle to be applied; but where the neighbor's land falls, without any act of his contributing to it, the one whose acts proximately caused it will be responsible. He is guilty of negligence either in law or in fact.[7]

We think this is the rule deducible from a fair consideration of all the authorities, although there are precedents which seem to inject the element of negligence in fact into all classes of this character.[8]

**§ 833. Right limited to support of soil in its natural state.**—As in the case of subjacent support,[9] the

[6] West Chester R. R. Co. v. McElwee, 67 Pa. 311, 315; McCully v. Clarke, 40 Pa. 399, 406, 80 Am. Dec. 584.

[7] In Pennsylvania there is a statute which compels a coal miner to leave pillars along a common boundary. Commonwealth v. Plymouth Coal Co., 232 Pa. 141, 81 Atl. 148, 149. In West Virginia a coal miner cannot mine within five feet of a division line. Gawthrop v. Fairmont Coal Co., 68 W. Va. 650, 70 S. E. 556. See, also, Mapel v. John, 42 W. Va. 30, 57 Am. St. Rep. 839, 24 S. E. 608, 609, 32 L. R. A. 800.

[8] See Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369.

[9] *Ante*, § 820.

lateral right applies only to the land in its natural condition.

> While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can, by his own act, enlarge the liability of his neighbor for an interference with this natural right. If a man be not content to enjoy his land in its natural condition, but wishes to build or improve upon it, he must either make an agreement with his neighbor or dig his foundation so deep, or take such other precaution as to insure the stability of his buildings or improvements, whatever excavation the neighbor may afterward make upon his own land in the exercise of his right.[10]

This rule is well established in America[11] and in England.[12]

The rule is inoperative where the right to the lateral support of the land with the superadded weight of structures has been acquired by grant or contract.

Also where a grant of land is made expressly for the purpose of erecting buildings thereon, or where, in contemplation of the parties, the land conveyed is to be enjoyed in a particular manner or for a particular purpose, a legal easement is created in favor of the land purchased, and a corresponding servitude im-

[10] Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312, 14 Morr. Min. Rep. 37.

[11] Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Charles v. Rankin, 22 Mo. 566, 66 Am. Dec. 642; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Stevenson v. Wallace, 27 Gratt. 77; Mamer v. Lussem, 65 Ill. 484; Busby v. Holthaus, 46 Mo. 161; McGuire v. Grant, 25 N. J. L. 356, 67 Am. Dec. 49; Laycock v. Parker, 103 Wis. 161, 79 N. W. 327, 332; Weiss v. Kohlhagen, 58 Or. 144, 113 Pac. 46, 48.

[12] Wyatt v. Harrison, 3 Barn. & Ad. 871; Peyton v. Mayor and Commonalty of London, 9 Barn. & C. 725; Partridge v. Scott, 3 Mees. & W. 220, 13 Morr. Min. Rep. 640.

posed on the adjoining land held by the grantor for support to the land with the superimposed structures.[13]

In England a right to lateral support of buildings may be acquired by prescription, but this doctrine has been rejected in America by the clear weight of authority, upon the same principles which led the American courts to abandon the English doctrine of ancient lights.[14]

**§ 834. The right of lateral support as applied to mines worked by hydraulic process.**—The English and Scotch writers on mining subjects devote some considerable space to the exposition of the law of lateral support and its application to the conduct of mining operations,[15] and there can be no doubt that in the main the doctrine of the English and Scotch cases is closely followed and adopted in the United States.

In the precious metal bearing states where vein mining is extensively carried on, we do not find that the question has assumed a serious degree of importance. The lodes or veins usually descend into the earth on planes approaching the vertical. Where the miner in the pursuit of his vein on its downward course passes out of his boundaries and enters the land adjoining, as he may lawfully do, he is usually so far removed vertically from the overlying surfaces as to render it impossible that his neighbor should be injured by the

[13] Robinson v. Grave, 27 L. T. 648; Rigby v. Bennett, 21 Ch. D. 559; S. C., 40 L. T. 47; Murchie v. Black, 19 Com. B., N. S., 190; Caledonian R. R. Co. v. Sprot, 2 Jur. N. S. 623, 2 Macq. H. L. Cas. 449; Palmer v. Fleshees, 1 Sid. 167; Cox v. Mathews, 1 Vent. 237.

[14] Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209, 210; Mitchell v. Rome, 49 Ga. 19, 15 Am. Rep. 669; Richart v. Scott, 7 Watts, 460, 32 Am. Dec. 779; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581; Winn v. Abeles, 35 Kan. 85, 57 Am. Rep. 138, 10 Pac. 443, 446.

[15] Bainbridge, 4th ed., pp. 284–293; Rogers, pp. 632–644; Stewart, p. 166; MacSwinney, p. 293.

underground exploitation. In pursuing the lode on its strike or onward course, upon reaching a common boundary there is little likelihood of the undisturbed portion of his neighbor's vein falling into the openings. It is usually rock in a most compact form, "in place," held in the firm embrace of the inclosing rocks, "in the mass of the mountain."

In dealing with the auriferous gravels existing in the form of superficial deposits which are mined by the hydraulic process,—that is, by means of the application of water under pressure through a nozzle against a natural bank,—the supreme court of California has held that the right of lateral support does not exist. The case in which this doctrine was announced was an action of trespass, coupled with a prayer for injunction,[16] and arose out of the following facts:—

Plaintiff and defendant owned adjoining placer mining claims, consisting of surface deposits of gold-bearing gravel, worked by the hydraulic process. In mining its own ground the defendant washed away the gravel to a point distant in one place seventy feet, and at other places from one hundred to one hundred and fifty feet from the plaintiff's claim. At these points the bank was deep, and as a necessary consequence of defendant's acts a portion of plaintiff's claim gave way and fell upon defendant's ground. This portion contained a small amount of gold-bearing gravel, a part of which defendant washed away; but the value of the gold extracted was much less than the necessary cost of extracting it. Some time after the defendant ceased to work its ground, large portions of the sur-

[16] Hendricks v. Spring Valley M. & I. Co., 58 Cal. 190, 192, 41 Am. Rep. 257.

face of plaintiff's claim caved and fell upon the adjoining ground of defendant, where it still remains. All of the caving was caused by the mining done by the defendant, but it was not claimed that the defendant's work was performed in a careless or improper manner. Said the court:—

> The question in the case is whether the doctrine of lateral support applies to cases like the present. We think not. The very purpose of locating the ground, both on the part of the plaintiff and the defendant, was to tear it down and wash it away. Its only value consisted in the gold it contained. To apply the doctrine contended for by appellant (plaintiff) to ground of this character, would, therefore, to a great extent defeat the very purpose for which it was located.
>
> Defendant would be liable for the gold taken from the gravel that fell from the plaintiff's claim but for the fact that its value was less than the necessary cost of extracting it.

At the time the alleged trespass was committed, and when the case was decided, the following statutory provision, not referred to by either court or counsel, in the case, was (and still is) in force in California:—

> Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavation on the same for the purpose of construction, on using ordinary care and skill and taking reasonable precautions to sustain the land of the other and giving previous reasonable notice to the other of his intention to make such excavations.[17]

As the case was considered independently of any questions of priority of location, it logically follows from the doctrine announced that the solution of the

[17] Civ. Code, § 832.

questions as to which one of the coterminous owners of placer mining ground worked by the hydraulic process is to suffer an inevitable diminution of his estate, will depend entirely upon which one of them exercises the more diligence in approaching the common boundary.

The Hendricks-Spring Valley case was cited and strongly urged by counsel in Victor Mining Co. v. Morning Star Mining Co., considered by the court of appeals of the state of Missouri.[18] We find no mention of it, however, in the opinion of the court, which expresses the following views:—

> If the character of the adjoining soil is such that it will, and does, sustain its own weight, and the natural pressure thereon by the power of its coherence without the aid of the support of the surrounding soil, the adjoining owner may remove his soil without liability to damage.

[18] 50 Mo. App. 525.

# CHAPTER IV.

## DEPOSIT OF MINING DEBRIS IN RUNNING STREAMS AND ON LAND OF OTHERS—PRIVATE NUISANCES.


§ 838. The use of water in the conduct of mining operations.

§ 839. Pollution of streams—The English rule—Tin streaming in Cornwall.

§ 840. The American rule as declared in states not accepting the Pacific coast doctrine as to right of appropriation and user of water.

§ 841. The rule in the mining states and territories where the right of appropriation is recognized.

§ 842. The remedy by injunction to prevent pollution of water.

§ 843. The deposit of tailings and refuse on the lands of others.

§ 844. Measure of damages for unlawfully depositing debris on another's land.


**§ 838. The use of water in the conduct of mining operations.**—Water in the conduct of mining ventures is an all-important factor. Without it mining operations cannot be prosecuted. While in underground exploitations it is looked upon as a common enemy to be met and conquered, yet when brought to the surface, or found in the running brooks and streams, it becomes an indispensable auxiliary to the various processes by which the miner extracts the metals from the rocks and ore-bearing earth. The right to appropriate and use water for such purposes, and the manner in which such rights may be acquired and enjoyed, are so intimately associated with the mining industry, particularly in the precious metal bearing states and territories, that it is almost impossible to treat of some of the phases of mining law without discussing the law pertaining to the use of water. Yet to intelligently present even in outline this interesting branch of the law

and reach conclusions as to the underlying principles which control it as applied to mining, we would not only be forced to recognize and draw geographical lines, but would be compelled to introduce into the discussion elements involving the utilization of water for an infinite variety of purposes wholly disassociated with mining ventures.

In one section of the Union the strict doctrine of riparian ownership as known to the common law is administered with rigid uniformity. In another there has been a manifest tendency to depart from the doctrine by reason of industrial environment and public necessity.

It may be assumed, without examining or citing authorities, "where we meet an embarrassment of abundance,"[1] that under the common law no absolute right of appropriation of water for useful or beneficial purposes was recognized. The owner of land through or along which a stream flowed had a right to insist that it should so flow, whether in so flowing he derived any practical benefit from it or not. His neighbor above had no right to divert it or use any part of it in such a way as to either appreciably diminish its quantity or affect its quality, unless he had acquired a right to do so by grant or prescription. The maxim, "*Aqua currit et debet currere, ut currere solebat,*" embodies both the letter and spirit of the common law.

This maxim has never been recognized as possessing controlling force in the Pacific states and territories. In this behalf we may accept without question the statements announced by the supreme court of the United States in the cases of Atchison v. Peterson[2] and Basey v. Gallagher:[3]—

[1] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, 753.

[2] 20 Wall. (U. S.) 507, 22 L. ed. 414, 1 Morr. Min. Rep. 583.

[3] 20 Wall. (U. S.) 670, 22 L. ed. 452, 1 Morr. Min. Rep. 683.

By the custom which has obtained among miners in the Pacific states and territories where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or to use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of the miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land, as an incident to his estate. . . . .

This equality of right (at the common law) among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; but the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrines of riparian proprietorship with respect to the waters of these streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does in natural jus-

tice acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public land throughout the Pacific states and territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation, and enforced by the courts in those states and territories. . . . .

This doctrine of right by prior appropriation was recognized by the legislation of congress in 1866 [quoting the statute of congress]. The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited, in every case, in quantity and quality, by the uses for which the appropriation is made. . . . .[4]

In the case of Basey v. Gallagher,[5] Mr. Justice Field, speaking for the court, after quoting the decision in Atchison v. Peterson, said:—

The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in the states and territories of the Pacific coast by the customs of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.

After referring to the California case of Tartar v. Spring Creek Water & Mining Co.,[6] he adds:—

Ever since that decision, it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and saw-

[4] Id., 20 Wall. (U. S.) 510.

[5] 20 Wall. (U. S.) 670, 682, 22 L. ed. 452, 1 Morr. Min. Rep. 683.

[6] 5 Cal. 396, 14 Morr. Min. Rep. 371.

mills and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.[7]

The doctrine of these decisions is fully recognized in all the Pacific states and territories in cases where the appropriation of water is made *prior* to the conveyance by the government of lands through which the stream flows. Whoever purchases land from the United States or from the state, after the whole or some part of the water of a natural watercourse running through such land has been appropriated by someone else, takes subject to the rights acquired by such appropriator.[8]

But the supreme court of California, by a divided court, has denied any right of appropriation as against a nonconsenting riparian owner acquiring title *prior* to the act of attempted appropriation. In other words,

[7] See, also, Jennison v. Kirk, 98 U. S. 453, 461, 25 L. ed. 240, 4 Morr. Min. Rep. 504; Broder v. Natoma Water Co., 101 U. S. 274, 276, 25 L. ed. 790, 5 Morr. Min. Rep. 33; Union M. & M. Co. v. Dangberg, 81 Fed. 73, 94.

[8] Sturr v. Beck, 133 U. S. 541, 546, 10 Sup. Ct. Rep. 350, 33 L. ed. 761; Black's Pomeroy on Water Rights (Mr. Black's addendum to § 26, citing Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, 725; South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222, 223; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Speake v. Hamilton, 21 Or. 3, 26 Pac. 855, 857; Kaler v. Campbell, 13 Or. 596, 11 Pac. 301; Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541, 542; Kirk v. Bartholomew, 2 Idaho, 1087, 29 Pac. 30, 42); Elliott v. Whitmore, 8 Utah, 253, 30 Pac. 984, 985.

where the government sells lands traversed by running streams, the common-law doctrine of riparian rights, with all its incidents and attributes, attaches immediately upon such sale, and prevents any future appropriation of the water as against such riparian proprietor.[9]

The supreme court of Washington coincides with this view,[10] and so did the supreme court of Oregon[11] until its recent decision in the case of Hough v. Porter.[12] The question there involved was as to the effect of the act of congress of March 3, 1877, known as the "desert land act,"[13] construed with the provisions of the act of congress of July 26, 1866,[14] upon the riparian rights on public lands reduced to private ownership since the passage of the desert land act.

This act provides for the reclamation of arid public lands and for the procuring of title thereto, and requires as essentials to such reclamation and acquisition of title that the right to the use of the water by the person conducting such reclamation shall depend upon the *bona fide* prior appropriation, and that such right shall not exceed the amount of water actually appropriated and necessarily used for the purposes of

[9] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, 753, and California cases cited *supra;* Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 19, 30 L. R. A. 390.

[10] Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495, 499, 39 L. R. A. 107; see, also, Judson v. Tidewater Lumber Co., 51 Wash. 164, 98 Pac. 377, 379.

[11] Carson v. Gentner, 33 Or. 512, 52 Pac. 506, 508, 43 L. R. A. 130; Curtin v. La Grande Water Co., 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 379, 10 L. R. A. 484.

[12] 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 1095, 102 Pac. 728.

[13] 19 Stat. 377; U. S. Comp. Stats. 1901, p. 1548; 6 Fed. Stats. Ann. 392.

[14] Rev. Stats., § 2339; 14 Stat. 253; 7 Fed. Stats. Ann. 1090; U. S. Comp. Stats. 1901, p. 1437.

irrigation and reclamation, and then provides further:—

> And all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

The supreme court of Oregon, in construing this provision of the act, arrived at the conclusion that it in effect abrogated the common-law doctrine of riparian rights, and that all surplus waters, remaining after domestic use and stock demands, on public lands entered subsequent to March 3, 1877, were reserved to the public and subject to appropriation, according to the rule of priority, for irrigation, mining and manufacturing purposes.

While this construction of the "desert land act" has not as yet been passed on by the supreme court of the United States, it is referred to by that tribunal in the case of Boquillas Land & Cattle Co. v. Curtis,[15] and the conclusion is said to have been reached "upon plausible grounds."

The supreme court of Nevada[16] has declined to acquiesce in the interpretation of the law governing water rights as laid down by the courts of California and Washington, following the rule announced by the supreme court of Colorado:—

> The right to water in this country by priority of appropriation, we think, is and has always been the

[15] 213 U. S. 339, 29 Sup. Ct. Rep. 493, 53 L. ed. 822.

[16] Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442, 448 (overruling Van Sicker v. Haines, 7 Nev. 249); Reno Smelting M. & R. Works v. Stevenson, 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 317, 319, 4 L. R. A. 60.

> duty of the national and state governments to protect. . . . . It is entitled to protection as well after patent to a third party of the land over which the natural stream flows as when such land is a part of the public domain.[17]

The Colorado rule is also recognized in Alaska, Arizona, Idaho, New Mexico, Utah, and Wyoming.[18]

In addition to the conflict of opinion in the different states as to the extent to which the doctrine of the common law on the subject of appropriation and use of water for useful purposes has been modified, it may also be noted that in each state and territory where the right of appropriation is recognized we encounter legislation more or less comprehensive in its scope, regulating the manner in which water may be appropriated and the nature and extent of its use.

Considering all these varying conditions, it would be impossible for us to deal comprehensively with the subject of water without practically writing a special treatise. This it is wholly unnecessary to do. Others have devoted themselves to the task, and to their works we should necessarily turn for enlightenment upon this branch of the law. We are permitted here to deal with it only in a collateral and limited way. We shall confine ourselves to the question of fouling the waters of the running streams in the conduct of mining operations, and the injuries flowing from the deposit of tailings and other refuse upon the lands of others.

[17] Coffin v. Left Hand Ditch Co., 6 Colo. 443. See, also, Armstrong v. Larimer Co. Ditch Co., 1 Colo. App. 49, 27 Pac. 235, 237; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142, 143.

[18] Mr. Wiel, in his "Water Rights," volume 1, page 141, has collected the authorities on the subject (note 20, page 141), and says that the Colorado rule is partially in force in Nebraska, Oregon and Texas.

**§ 839. Pollution of streams—The English rule—Tin streaming in Cornwall.**—The English and Scotch authors on mining subjects are agreed, generally speaking, as to the extent to which the waters of running streams may be used by persons engaged in conducting mining and manufacturing operations on their banks, independently of rights acquired by grant or prescription. We may accept their conclusions without undertaking a citation or analysis of all the cases from which these conclusions are adduced.

We quote from Bainbridge:—

> A riparian owner has the general right to receive the waters in as pure a state as nature affords them, and such owners are equally bound to transmit them to proprietors below without diminution, diversion, or deterioration. For all riparian owners acquire no property in the water itself, but only the privilege of using it in its passage by reasonable interference. For the same reason the waters cannot be forced back upon the owners above, nor so retarded or accelerated as to cause injury to those below.[19]

Mr. Rogers says:—

> *Prima facie*, no one has a right to defile water, and there is no distinction in this respect between water which flows and water which percolates through the soil.[20]

Mr. MacSwinney states the rule more liberally:—

> On the same principle that a riparian owner may use a stream in a reasonable degree, or abstract or divert it in reasonable quantities, he may, by washing his minerals by means of it, or pumping water from his mines into it, alter its quality in a reasonable degree; but, as he may not sensibly diminish the body of the stream, he may not sensibly alter its

[19] Bainbridge, 4th ed. (1878), p. 227.

[20] Rogers, 2d ed. (1876), p. 667.

quality. He must not, therefore, *prima facie*, impregnate the stream with poisonous or foul matter.[21]

We select the following excerpts from the recent treatise of Mr. Ross Stewart:[22]—

A lower heritor has this interest in the stream: that in passing through the lands of otliers it shall be transmitted to him undiminished in quantity, unpolluted in quality, and unaffected in force and natural direction and current, except in so far as the primary uses[23] of it may legitimately operate upon it within the lands of the upper heritor. . . . . Any one may, *prima facie*, use a running stream for the purpose of washing minerals, or, if it would have reached the stream naturally within his own lands, may pump the water from his mine into it, provided it does not thereby alter its quality to the prejudice of his neighbor. No upper heritor is entitled to pollute the water of a stream to the injury of those below him, and in the act of throwing impurities into the river artificially produced, he is a wrongdoer. He has no right to do this merely because the premises he occupies are on the banks of the stream.

And quoting from the Esk pollution case:[24]—

Riparian proprietors are entitled to use the water in any way they may like as it passes through their property, subject to only certain conditions. Now, these conditions are, that they shall send down the water to their neighbors below undiminished in quantity and unimpaired in quality. . . . . As regards the matter of purity, it is impossible, in the nature of things, that a running stream should not receive in its course certain impurities as it passes along. The action of nature is inconsistent with such a condition as that; but the meaning of the

[21] MacSwinney on Mines (1884), p. 396.

[22] Stewart on Mines and Minerals (Edinburgh, 1894), pp. 223, 230.

[23] "Primary use of water includes its use for *all* domestic purposes, including, as well, its use for man or beast." Wood on the Law of Nuisances, § 445.

[24] Duke of Buccleuch v. Cowan, 2 App. Cas. 344.

condition is, that no unnecessary or artificial impurity shall be put into the stream so as thereby to diminish the purity of the water as it passes to the proprietors or the inhabitants below.

But in England there are some localities where the common-law rules in this behalf do not obtain. In the mining regions where water is necessary for the proper conduct of mining operations, we find that the law elsewhere prevailing has been there altered by custom.

"Streaming" for tin, which is the ancient method of getting tin in Cornwall, is a process of obtaining granular tin by means of washing. It is necessarily carried on entirely by means of open workings, and it appears usually to result in as complete a destruction of the surface as takes place in the case of quarrying,[25] or in mining by the hydraulic process in the auriferous placers of the United States.

Therefore, in Cornwall, by a custom founded upon industrial necessity, tin bounders were entitled to the free use of the water over the whole district within their bounds, and to the right of diverting that water into other streams. Cleansing the produce of their workings by "streaming" is almost always a necessary part of their operations.[26]

Therefore, tin bounders are entitled by custom to wash their minerals in the streams of water within their bounds, and to send down such streams the sand, stones, rubble, and other stuff dislodged in the process of the workings, and the right exists even in the case of natural surface streams, although its exercise may either foul or obstruct them to the damage of other riparian owners.[27]

[25] MacSwinney on Mines, p. 384.

[26] Id., p. 434, citing Rogers v. Brenton, 10 Q. B. 25; Gaved v. Martyn, 19 Com. B., N. S., 732, 751.

[27] MacSwinney on Mines, p. 435 (citing Carlyon v. Lovering, 1 Hurl.

So a claim by custom to a right to foul the water of a stream is a defense to an action for polluting it, and such custom has been held not to be either indefinite or unreasonable, but limited to the necessary working of the mines.[28]

A right to so foul a stream might also be acquired by either grant or prescription, the prescription period, as fixed by act of parliament, being twenty years.[29]

**§ 840. The American rule as declared in states not accepting the Pacific coast doctrine as to right of appropriation and user of water.**—With the exception of those mining states of the west accepting and recognizing the right to appropriate, divert and use running water (the doctrine referred to in a preceding section), the decisions of the American courts follow in the main the English rule. The American commentators and authors upon the subject restate and apply the maxims of the English common law, and there can be no doubt, generally speaking, that the doctrine prevails in most of the states of the Union, except those wherein the

& N. 784, 26 L. J. Ex. 251, 14 Morr. Min. Rep. 397. Under the laws of the stannaries, they must not, however, in exercising the right, injure rivers or lands adjoining rivers, and if, as a consequence of its exercise, lands become overflowed by a river, they are bound within two days after receiving notice from any person thereby injured to clear the river, and in default are liable to damage and a fine; and for the protection of havens and ports in Cornwall, persons who stream for tin near any waters or rivers flowing into such havens or ports are under a statutory obligation to prevent the dislodged sand, stones, gravel, and rubble from being conveyed into such havens or ports.

[28] MacSwinney on Mines, p. 397.

[29] The act of parliament passed in 1876 (39 & 40 Vict. 75), known as the rivers pollution prevention act, inhibits miners from permitting to flow into streams "any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine, other than water in its same condition as that in which it has been drained or raised from such mine." Bainbridge, 4th ed., p. 329.

federal mining laws are operative. We observe, however, particularly in later years, a manifest tendency in the older states of the Union toward relaxing the common-law rules of riparian ownership, with regard to the extent to which the flowing waters may be used in connection with the manufacturing interests of the country and the industrial necessities of communities. While conceding that the upper proprietor must so use the water of a stream as not to appreciably diminish its volume or impair its quality, the courts are liberally disposed when dealing with what constitutes such impairment.

As Mr. MacSwinney observes, purity is a relative term. No water is absolutely pure. No one would contend that in any state of the Union one owner on the bank of a stream would have a right to deposit in such stream offal from slaughter-houses, cattle-yards, hog-pens, or water charged through metallurgical operations with sulphuric or muriatic acid, where the proprietor below was compelled to use such water for domestic purposes. These substances injure and taint the water. The offensive elements will remain in solution perpetually, whether the water flows or is at rest; but between offensive and poisonous elements of this character and the sand or tailings from an ordinary quartz-mill or placer mine, or sawdust from a sawmill, there is a wide difference. The tailings from a mine are carried by the stream in suspension. When the water is at rest the sand, silt, and comminuted particles settle to the bottom. The water above is not tainted, and can be used for all the primary purposes for which water is used. Every stream on its road to the sea carries earthy substances in suspension and mineral substances in solution, gathered on its way from the operation of natural causes. Every storm

in the mountains loads the running waters to the utmost of their carrying capacity with the same class of material that the gold miner places in them by artificial methods.

So with ordinary sawdust from the sawmills. Depositing sawdust in a stream is not, *per se*, a nuisance. If the lumber manufacturer operates his works in a reasonable manner, he has a right to discharge the sawdust and waste from it into the stream in the ordinary course of his operations. He is not bound as a matter of law to prevent them from going into the stream, nor to impound or draw them off or deposit them so that they cannot get into the stream.[30] We may quote instructively from Chief Justice Redfield, speaking for the supreme court of Vermont:—

> In regard to many uses of the water in streams, it has long been settled by common consent, or is so obvious in itself that it is determinable as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some debris or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and in some instances the indispensable necessity, would seem sufficiently to decide such cases. . . . . The deposit of sawdust to some extent is nearly indispensable in the running of sawmills and most other machinery used in the manufacture of wood and propelled by water power. The reasonableness of such use must determine the right, and this must depend upon the extent of the detriment to the riparian proprietor below.[31]

Of course, even the deposit of waste from a sawmill *may* become a nuisance.

[30] Jacobs v. Allard, 42 Vt. 303, 1 Am. Rep. 331.

[31] Quoted in Gould on Waters, § 220, from Green v. Gilbert, 60 N. H. 144. See, also, Waterman v. Buck, 58 Vt. 519.

In Lockwood Co. v. Lawrence, decided by the supreme court of Maine,[32] the complainants were operating extensive cotton manufactories on the Kennebec river. Numerous defendants were engaged at different points above in operating sawmills, planing-mills, clapboard and other manufacturing machines, and discharging into the river sawdust, edgings, shavings, refuse, and other debris. Such material commingling into one indistinguishable mass, was carried by the current of the river and brought to the ponds, raceways, and wheels of complainant, filling the same, stopping the wheels, and retarding and preventing the running of the cotton mills.

An injunction was ordered restraining the defendants from casting or depositing in the river above complainant's dams and manufactories any refuse materials, edgings, shavings, debris, wood refuse, and what is denominated "long sawdust," not including, however, common sawdust. As to this latter substance the court declined to consider it as a nuisance. In reaching its conclusions the court quoted approvingly from the Minnesota case of Red River Roller Mills v. Wright:[33]—

> In determining what is a reasonable use, regard must be had to the subject matter of the use, the occasion, and the manner of its application, the object, extent, necessity, and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the

[32] 77 Me. 297, 52 Am. Rep. 763.

[33] 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167, 169.

country in similar cases, and all the other and ever-varying circumstances of each particular case bearing upon the question of the fitness and propriety of the use of the water under consideration.

To the same effect is the case of Prentice v. Geiger,[34] decided by the New York court of appeals, where it was held that the jury, in determining the question of reasonable use, would be entitled to consider all the circumstances, such as the general character and condition of the stream, its volume and rapidity, the degree of injury which it occasioned, the custom and usage of the country, and the necessity for using the stream for this purpose.

While sawdust, quartz, and placer tailings are, when discharged into running streams in reasonable quantities, comparatively speaking, innocuous, when we enter the coal and iron regions of the east and south we naturally look for the application of less liberal rules. Water used in cleansing the iron ores of the coal measures becomes charged with more or less deleterious chemical substances. So water used in washing coal, or which is pumped from coal mines, is almost invariably so impregnated with sulphur, coal gas, oil, or other mineral hydrocarbons, as to render it unfit for any reasonable use. While the courts of all the eastern and southern states concede the operative force of the common law on the subject of the pollution of water in the conduct of mining operations, yet in many instances we find a disposition to qualify the law as interpreted by the English courts.

According to Judge Paxson, of the supreme court of Pennsylvania,[35] English cases are not safe prece-

[34] 74 N. Y. 341.

[35] See his dissenting opinion rendered in Sanderson v. Pennsylvania Coal Co. (first appeal), 86 Pa. 401, 27 Am. Rep. 711, 11 Morr. Min. Rep.

dents upon such a question. They are influenced to some extent by the social and political conditions of the country. The mines in England are generally located in highly improved sections, where the land possesses great intrinsic value and the streams are filled with choice fish, the sole right to which is in the nobility and landed gentry. Under such circumstances, we could hardly expect the English judges to lay down a rule suited to the rough mountain lands which, in the main, constitute the mining regions of Pennsylvania.

For the purpose of ascertaining the current of judicial thought on the subject in the eastern and southern states, we may advantageously select a few leading cases, without attempting to present such an exhaustive collection of authorities as may be found in the special treatises on the law of watercourses or nuisances.

We naturally turn to the state of Pennsylvania when seeking precedents on mining questions disconnected with the features peculiar to the federal system. Of all the cases considered by the supreme court of that state involving the subject of pollution of water in the conduct of coal-mining operations, the case of Sanderson v. Pennsylvania Coal Co. is the most noted. It was before the appellate tribunal four times,[36] and has been referred to in every case of importance involving the pollution of running water which has been decided by the courts of any of the states since the first opinion was rendered.

60, which on the fourth appeal was adopted by the majority of the court. Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, a case fully discussed, *post*.

[36] 86 Pa. 401, 27 Am. Rep. 711, 94 Pa. 302, 39 Am. Rep. 785, 11 Morr. Min. Rep. 79, 102 Pa. 370, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453.

It arose out of the following state of facts: Plaintiff, Sanderson, purchased a tract of land in the city of Scranton and erected a residence thereon at a cost of eighty thousand dollars. Before the purchase, Meadow brook, a stream of pure water, ran through the tract. The existence of this stream was the leading inducement to plaintiff to buy and build. Dams were built across it by plaintiff for the purpose of a fish and ice pond and to supply a cistern. Water was carried from the cistern to a ram, and thence to a tank in the attic of the house. After these improvements were perfected, the Pennsylvania Coal Co., defendants, established a colliery on lands belonging to them along the stream and about two miles above the land of plaintiff. A drift was first made into their mine and a shaft was afterward sunk. The water which collected in the drift, as well as that pumped by powerful engines from the shaft, ran into Meadow brook. It was alleged on the trial that the effect of the mine water was to corrupt the water of the stream and to render it worse than worthless for any domestic or household use. There was evidence that the fish in the brook were destroyed; that the willows along the bank died; that the pipes connecting with the cistern, the ram, and the house, were corroded and eaten out; that the water became unfit for domestic uses, and its use for all purposes was abandoned. The court below held that the facts were insufficient to warrant a verdict, and granted a nonsuit, from which ruling the plaintiff appealed.[37]

The coal company, in defending its right to pollute the water, asserted that it was conducting a lawful business in a lawful way; that in working its mine it encountered water, and the only way in which it could

[37] 86 Pa. 401, 27 Am. Rep. 711.

be disposed of was by raising it to the surface by means of pumps; that when discharged at the surface it sought the natural outlet through Meadow brook and thence to the Lackawanna river; that the material carried down the stream in suspension and solution was not the result of any artificial treatment of the coal after mining, but the contamination of the water arose from the natural underground percolation into the mine; that the operation of the mine would have to be abandoned unless such waters could be so discharged, and that were a rule to be recognized which inhibited it, anthracite coal mining in Pennsylvania would be practically at an end. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral should not be crippled and endangered by adopting a rule that would make collieries answerable in damages for corrupting a stream into which mine water would naturally run.

The appellate court, in reviewing the action of the trial court, took occasion to remark that in granting the nonsuit, sight appeared to have been lost of some distinctions which the law has settled, and that a mistake had been made in selecting the class of precedents there followed. While proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes, and that for slight inconveniences or occasional annoyances they ought not to be held responsible, and in dealing with such complaints juries should be held with a steady hand, yet the appellate tribunal insisted that there must be one rule of law maintained for all men, and by that rule all men's rights must be tested. Said the court:—

> Undoubtedly the defendants were engaged in a perfectly lawful business in which large expend-

itures had been made and with which widespread interests were connected; but however laudable an industry may be, its managers are still subject to the rule that their property cannot be so used as to inflict injury on the property of their neighbors.

The decision is replete with quotations of common-law maxims and citations from English cases. After quoting from Justice Mellor's charge to the jury in St. Helen's Smelting Co. v. Tipping,[38] the court closes with the following:—

> Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations in one direction would logically be followed by the same relaxation and remission on the same grounds in all other directions. One invasion of individual right would follow another, and it might be only a question of time when, under the operation of even a single colliery, a whole countryside would be depopulated.

The judgment was reversed and the cause remanded for a new trial. The second trial was conducted upon the legal theories announced by the supreme court, and resulted in a verdict for plaintiff for two hundred and fifty dollars damages. Both parties sued out writs of error, the defendant to secure reconsideration of the question of its liability, and the plaintiff to correct alleged errors in excluding testimony as to the *quantum* of damages.

The two appeals were heard separately. As to the defendant's liability the appellate court held to its former opinion. Said the court:—

> It is urged that mining cannot be carried on without this flow of acidulous water, hence neighboring streams must be polluted. This is true; and it is also true that coal mining would come to nothing

[38] 11 H. L. C. 642.

without roads upon which to transport the coal after it is mined; therefore roads are necessary; but it does not follow that for such purposes the land of an adjacent owner may be taken or his right of way encumbered without compensation.[39]

The judgment was affirmed. This would have finally disposed of the case had it not been for the writ of error sued out by the plaintiff. His exceptions to the refusal of the court to admit certain testimony were sustained by the appellate court, and the case was remanded for a third trial,[40] upon which plaintiff received a larger judgment and the coal company appealed. The question of the defendant's liability was reopened and reargued. In the meantime there had been a change in the personnel of the supreme bench. The court, sitting on the last appeal, declined to follow the former opinion rendered in the case.[41]

Said the court, reversing the judgment:—

The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community. Nor do we say that a miner, in order that his mines may be made available, may enter upon his neighbor's lands or inflict upon him any other immediate

[39] Pennsylvania Coal Co. v. Sanderson, 94 Pa. 302–308, 39 Am. Rep. 785, 11 Morr. Min. Rep. 79. In Pennsylvania, mining is not a "public use." A coal miner could not condemn rights of way for roads or other mining easements (*ante*, § 261).

[40] Sanderson v. Pennsylvania Coal Co., 102 Pa. 370.

[41] Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, 459.

> or direct injury, but we do say that in the operation of mining in the ordinary and usual manner, he may, upon his own lands, lead the water which percolates into his mine into the streams which form the natural drainage of the basin in which the coal is situated, although the quantity as well as the quality of the water in the stream may thereby be affected.

The court referred to the dissenting opinion written by Justice Paxson, when the case was first before the court, by quoting and adopting the following portion of it:—

> The population, wealth, and improvements are the result of mining and that alone. The plaintiffs knew when they purchased their property that they were in a mining region. They were in a city born of mining operations and which had become rich and populous as a result thereof. They knew that all mountain streams in that section were affected by mine water, or were liable to be. Having enjoyed the advantages which coal mining confers, I see no great hardship nor any violence to equity in their also accepting the inconveniences necessarily resulting from the business.

It must be candidly conceded that the reasoning of these later opinions of the Pennsylvania court goes beyond that of any other case previously found in the books. They announce a doctrine which might become extremely dangerous, if generally accepted. The supreme court of Indiana has, however, expressly adopted the doctrine in question in Barnard v. Shirley,[42] and it has been in that state applied in several later cases.[43]

[42] 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 605, 24 L. R. A. 568.

[43] Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610, 615; Barnard v. Shirley (Ind.), 35 N. E. 117, 24 L. R. A. 575; S. C., 151 Ind. 160, 47 N. E. 671, 41 L. R. A. 737; City of Valparaiso v. Hagen, 153 Ind. 337,

Their correctness has been denied by the supreme court of errors of Connecticut, which says of them: "We do not find other cases that take this extreme ground." [44]

In a recent case decided by the supreme court of Idaho involving the right to damages for the destruction of land used for agricultural, grazing, farming and residence purposes by the pollution of a running stream through the milling and concentrating processes of a mining company and the dumping of rock, earth and waste material into such stream,[45] Ailshie, J., in a concurring opinion, upholding a right of action in the plaintiff for such damage, cites with approval the principle enunciated in the cases of Barnard v. Shirley and Pennsylvania Coal Co. v. Sanderson, *supra;* but justifies the ruling of the court in the case before it upon the ground that under the constitution of the state of Idaho, a miner in an agricultural section would not be permitted to use the waters of an irrigation stream for the purpose of milling and concentrating ores in such a manner as to poison or pollute the waters thereof to the injury of growing crops on irrigated lands below, nor to dump into such stream great masses of waste material to the detriment of such agricultural lands.

The Pennsylvania court itself has, in subsequent cases, been careful to limit the application of the prin-

74 Am. St. Rep. 305, 54 N. E. 1062, 1064; Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N. E. 354, 355.

[44] Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154, 163, 48 L. R. A. 692. See, also, Sterling Iron & Zinc Co. v. Sparks Mfg. Co. (N. J.), 38 Atl. 426, 427; Travis Placer M. Co. v. Mills, 94 Fed. 909, 910, 37 C. C. A. 536.

[45] Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907, 913. The majority opinion quotes largely from the text of this section as it appeared in the second edition.

ciples lastly announced to cases where the water discharged was such only as came into the mine by natural percolation, and has declined to extend it to instances where material was brought to the ground and artificially treated, the refuse and waste being discharged into the streams,[46] and it may be plausibly asserted that these later cases weaken the force of the rule finally announced in the Sanderson case.[47] There is an abundance of authority in the earlier decisions for the doctrine that a stream of water may not be fouled by the introduction into it of any foreign substances to the damage and injury of the lower riparian proprietor.[48]

In a state which does not recognize the right to appropriate and divert water for useful or beneficial purposes, or acquire by prior appropriation the right to use a running stream in a particular manner, there is no sanction for any doctrine which measures the rights of an individual by his convenience or necessity.

> If the injury complained of were merely a fanciful wrong, or produced simply personal discomfort, there might be no real ground of complaint; but when the result of the acts of one on his own land is a direct and material injury to the property and property rights of another, a very different question arises, and in such cases the maxim of *sic utere tuo ut alienum non laedas* applies.[49]

[46] Robb v. Carnegie etc. Co., 145 Pa. 324, 27 Am. St. Rep. 694, 22 Atl. 649, 650, 14 L. R. A. 329; Lentz v. Carnegie, 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219, 220.

[47] See Hauck v. Tide Water Pipe Line Co., Ltd., 153 Pa. 366, 34 Am. St. Rep. 710, 26 Atl. 644, 645, 20 L. R. A. 642; Elder v. Lykens Valley Coal Co., 157 Pa. 490, 37 Am. St. Rep. 742, 27 Atl. 545, 546.

[48] Howell v. McCoy, 3 Rawle (Pa.), 256; Barclay v. Commonwealth, 25 Pa. 503, 64 Am. Dec. 715; McCallum v. Germantown W. Co., 54 Pa. 40, 93 Am. Dec. 656.

[49] Columbus & Hocking C. & I. Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630, 633.

As was said by the supreme court of Ohio:—

> While the thing to be done may be lawful in a general way, there is and must be limitation upon the means by which it is to be done. Nor is it of consequence that the operation of mines tends to the development of the natural resources of the country. But few enterprises, the product of which is useful, fail to advance the general good.[50]

The supreme court of Alabama, in a case involving the washing of iron ore and discharging the waste into a running stream, gives its sanction to the views expressed in the first decision of the supreme court of Pennsylvania in the Sanderson case,[51] recognizing the exigencies of the great industrial interests of the country, and adds:—

> Nor must we shut our eyes to the tendency, the inevitable tendency, of these and other uses in which water is an indispensable element, to detract somewhat from its nominal purity. These modifications of individual right must be submitted to in order that the greater good of the public be conserved and promoted; but there is a limit to this duty to yield to this claim and right to expect and demand. The watercourse must not be diverted from its channel or so corrupted and polluted as practically to de-

[50] See, also, Nebo Consol. C. & C. Co. v. Lynch, 141 Ky. 711, 133 S. W. 763, 764; Good v. West Min. Co., 154 Mo. App. 591, 136 S. W. 241, 242; Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142, 145, 51 L. R. A. 687, 21 Morr. Min. Rep. 38; Young v. Bankier Distilling Co., [1893] 1 App. Cas. 691; Beach v. Sterling Iron Co., 54 N. J. Eq. 65, 33 Atl. 286, 288; Day v. Louisville Coal & Coke Co., 60 W. Va. 27, 53 S. E. 776, 777, 10 L. R. A., N. S., 167; Bowling v. Ruffner, 117 Tenn. 180, 100 S. W. 116, 119, 9 L. R. A., N. S., 923, 10 Ann. Cas. 581. See, also, note to 10 Ann. Cas. 587; Niagara Oil Co. v. Ogle (Ind.), 98 N. E. 60, 62. See, also, note to 22 Harv. Law Rev. 544; Columbus & Hocking C. & I. Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630, 632.

[51] 86 Pa. 401, 27 Am. Rep. 711, 11 Morr. Min. Rep. 60.

stroy or greatly impair its value to the lower riparian proprietor.[52]

This is in harmony with the rule declared in Georgia in a similar case.[53]

The supreme court of appeals of Virginia says of the decision in the Sanderson case:—

> The conclusions reached in the last appeal are not in accord with principles which have for centuries been applied in determining the common interests and rights of riparian proprietors, and the case has received but little approval outside the jurisdiction in which the ruling was made.[54]

In the very nature of things it is impossible to enunciate a general rule as to what constitutes a reasonable use of running water, which may be applied uniformly to all cases. It depends upon circumstances.[55]

The limit which separates the lawful from the unlawful is a question of degree.[56]

No positive rule of law can be laid down to define and regulate such use with entire precision. As to this all courts agree.[57] It is a question of fact, to be determined by the jury.[58]

[52] Tennessee Coal, I. & R. Co. v. Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167, 170. See, also, Drake v. Lady Ensly Coal, I. & R. Co., 102 Ala. 501, 48 Am. St. Rep. 77, 14 South. 749, 751, 24 L. R. A. 64, wherein Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, was relied upon to sustain the right to pollute the water.

[53] Satterfield v. Rowan, 83 Ga. 187, 9 S. E. 677, 678.

[54] Arminius Chemical Co. v. Landrum (Va.), 73 S. E. 459, 463.

[55] Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Elliott v. Fitchburg R. R., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Thurber v. Martin, 2 Gray (Mass.), 394, 61 Am. Dec. 468.

[56] Mayor of Baltimore v. Appold, 42 Md. 442.

[57] Timm v. Bear, 29 Wis. 254. For a valuable collection of cases upon the subject of reasonable use, consult the elaborate note to Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636.

[58] Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230; Hayes v. Wal-

**§ 841. The rule in the mining states and territories where the right of appropriation is recognized.**—We reserve for a subsequent article the larger questions arising from the deposit of mining debris into navigable waters and their tributaries in the conduct of hydraulic mining on the gigantic scale practiced in some of the western states, and the regulation of this class of mining by congressional law in certain portions of California—questions affecting the general public. For the present we confine ourselves to a consideration of the extent of the miner's right in the Pacific coast states and territories to utilize the carrying power of water by the discharge of tailings and mining refuse into the running streams, and the limitations of that right.

As heretofore noted,[59] the common-law rule regulating riparian rights has not been recognized or applied in many of the Pacific states and territories. This departure from the English doctrine had its origin in the same necessities which compelled the tin bounders of Cornwall in the early period of British history, or probably in the prehistoric period, to utilize the waters of the running streams for the purpose of mining and washing their ores.[60]

The peaceful invasion of California, upon the discovery of gold and the inauguration of placer mining, may not be likened to the Roman occupation of Britain and the inception of tin streaming in Cornwall, but there are marked analogies. The economic necessities of both were the same. In both countries a custom

dron, 44 N. H. 580, 84 Am. Dec. 105; Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907, 912; Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N. E. 354, 355. See note to Davis v. Getchell, 79 Am. Dec. 636, 644.

[59] *Ante*, § 838.

[60] *Ante*, § 839.

originated in these necessities. Both countries were new in an industrial sense. There were no fertile fields to injure, no cultivated farms or orchards to be destroyed, and no navigation of inland waters to be obstructed. In time these customs in both countries were recognized by those having proprietary dominion over the soil. The charters of John and Edward I affirmed the right of tin bounders to appropriate and use the running waters, "*divertere aquas—sicut consueverunt*";[61] and the government of the United States, first by passive acquiescence, and then by legislative enactment and judicial declaration, recognized and established as the law of miners on public mineral lands the customs and regulations adopted in the gold regions of the west.[62]

While in some of the Pacific states and territories there may be doubt as to the extent to which these customs, as defined by legislation and judicial sanction, have left their impress on the existing system, yet in all the states and territories of the west where mining is a prominent and permanent industry we find the right of appropriation and the use of running water for mining purposes, to some degree at least, well recognized and established.

In the early days of mining in California, where the miners' rules and customs originated, the right to mine and the right to divert water stood upon an equal footing, and when a conflict arose it was determined by the fact of priority. The miner who selected a piece of ground to work took it as he found it, subject to prior

[61] Bainbridge on Mines, 4th ed., p. 153.

[62] Atchison v. Peterson, 20 Wall. (U. S.) 507, 513, 22 L. ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 20 Wall. (U. S.) 670, 681, 22 L. ed. 452, 1 Morr. Min. Rep. 683; *ante*, § 838.

rights which had an equal equity on account of an equal recognition from the sovereign power.[63]

The law did not tolerate any injury by one to the prior rights of another.[64]

The owner of a mining claim in the bed of a canyon might erect dams across it for the purpose of enabling him to work it, even if thereby other dams above were flooded, provided the claim in the bed of the canyon held priority. In such case the injury sustained by the subsequent locators was *damnum absque injuria*.[65]

So the prior locator of a mining claim on the banks of a stream had the right to the use of the bed of the stream for the purpose of fluming and working his claim, and any subsequent erection of a dam which interfered with the right was an encroachment for which damages might be recovered.[66]

One who entered upon a stream of water above a prior appropriator and erected hydraulic works was required to so construct them as not to impede the regularity of the flow of the water if its irregular flow would injure the first appropriator.[67]

Where a ditch was dug by a prior appropriator for the purpose of conducting water from a natural water-course, a miner had no right to work a mine above the head of the ditch in such a manner as to mingle mud and sediment with the water and injure its value to the ditch owner for mining purposes, or to fill up the ditch

[63] Irwin v. Phillips, 5 Cal. 140, 147, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

[64] Hill v. Smith, 27 Cal. 476, 482, 4 Morr. Min. Rep. 597.

[65] Stone v. Bumpus, 46 Cal. 218, 219, 4 Morr. Min. Rep. 278.

[66] Sims v. Smith, 7 Cal. 148, 149, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161.

[67] Phoenix Water Co. v. Fletcher, 23 Cal. 482, 486, 15 Morr. Min. Rep. 185; Bear River etc. Co. v. New York M. Co., 8 Cal. 327, 335, 63 Am. Dec. 325, 4 Morr. Min. Rep. 526.

and reservoir so as to lessen their capacity and increase the expense of cleaning them out.[68]

Some deterioration in the quality of the water necessarily resulted from carrying on mining operations on a running stream. A prior ditch proprietor could not insist that the stream above him should not be used to any degree by subsequent appropriators for mining purposes, and that the water should flow to the head of his ditch in a state of absolute purity. While the miner would not be permitted to so conduct operations as to destroy the ditch, or unreasonably interfere with its fair enjoyment, or to taint the water by the injection of poisonous chemicals,[69] the law recognized the necessity for some deterioration, and within reasonable limits it was *damnum absque injuria.*[70]

Any other rule might have involved an absolute prohibition of the use of all the water of a stream above any ditch supplied by it in order to preserve the quality of a small portion taken therefrom.[71]

In the case of Atchison v. Peterson,[72] the supreme court of Montana, while conceding that the first appropriator of water for mining purposes was entitled to the same as against subsequent appropriators, without material interruption in the flow thereof in quantity or quality, refused to enjoin a subsequent mining appropriator from discharging tailings into a stream which caused sediment and sand to be carried into

[68] Hill v. Smith, 27 Cal. 476, 482, 4 Morr. Min. Rep. 597; Hill v. King, 8 Cal. 327, 335, 4 Morr. Min. Rep. 533; Junkans v. Bergin, 67 Cal. 267, 7 Pac. 684, 686; McLaughlin v. Del Re, 71 Cal. 230, 16 Pac. 881, 883.

[69] Crane v. Winsor, 2 Utah, 248, 11 Morr. Min. Rep. 69.

[70] Bear River & Auburn Water Co. v. New York M. Co., 8 Cal. 327, 336, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.

[71] Id.

[72] 1 Mont. 561.

the prior appropriator's ditch, thereby compelling him to construct a sand-gate, or reservoir, which had to be "flushed" each day.

The supreme court of the United States affirmed the decree of the Montana court,[73] and laid down the law as quoted in a previous section.[74]

As between those mining on the same stream, the true rule was thus stated by the supreme court of California:—

> Each person mining in the same stream is entitled to use in a proper and reasonable manner both the channel of the stream and the water flowing therein, and where, from the situation of different claims, the working of the same will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*, and will furnish no cause of action to the party injured. The reasonableness of the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case.[75]

"Live and let live" was one of the homely maxims of the miners' law.

The foregoing illustrations serve to demonstrate the early doctrines as upheld and sanctioned by the courts. A retrospective view for the period of a half-century fails to disclose any serious judicial innovations upon these rules. While the supreme court of California, in the case of Lux v. Haggin,[76] and a line of cases following it, has, as against riparian owners, limited the right of appropriation to waters traversing public lands, there has been no disposition to deny to the miners the privilege, reasonably or rationally exer-

[73] 20 Wall. (U. S.) 507, 22 L. ed. 414, 1 Morr. Min. Rep. 583.

[74] *Ante*, § 838.

[75] Esmond v. Chew, 15 Cal. 137, 143, 5 Morr. Min. Rep. 175.

[76] 69 Cal. 255, 10 Pac. 674.

cised, of depositing tailings in the running streams.[77] The customs of the miners have been recognized factors in administering the law in the mining regions. As was said by Justice Henshaw, speaking for the supreme court of California,[78]—

> There are certain essentials to the practical conduct of all hydraulic mining operations. Water must be obtained in quantities and carried to the mining ground under pressure sufficient to disintegrate and wash down the natural bank. For these purposes, in the mining districts of this state, reservoirs, ditches, flumes, and pipe-lines are indispensable. The soil and gravel thus eroded must be carried by gravity and the force of the refluent water through cuts, sluice-ways, and flumes, where the gold, by reason of its greater specific gravity, is deposited, caught, and gathered. Lastly, by aid of the same beneficent agent, the resulting waste matter, soil, and gravel must be carried away through convenient channels, so as not to impede further operations. The water itself does not lose its utility to the miner, nor become an impediment to his work during any of these processes. Through them all it is not only of high utility but an absolute necessity. . . . . These facts are of such general knowledge and undisputed acceptance, so inherent in the character of hydraulic mining, that they scarcely need the evidence of local custom or any evidence at all for their establishment. . . . . Every use of water for purposes of hydraulic mining, sanctioned by local custom and law, is recognized as a right and protected as such.

What is here said applies with equal force to general mining and milling operations. The tailings from an

[77] This statement is subject to the qualification noted in the beginning of this section, with reference to the conduct of hydraulic mining in that portion of California subject to the jurisdiction of the California debris commission, as defined in the chapter following.

[78] Jacob v. Day (1896), 111 Cal. 571, 575, 44 Pac. 243, 244.

ordinary quartz-mill, when discharged into the running streams, have no greater tendency to deteriorate the quality of the water than the material washed from the natural banks. As a physical impediment they are comparatively harmless. They are fine particles of sand artificially produced, but of the same character as that washed into the streams from the rocks eroded by processes of nature which are universal.[79] While the privilege of depositing such tailings in the streams must be reasonably exercised, and so as not to materially impair or destroy rights acquired by a lawful prior appropriator, yet to say that the discharge of such tailings is a nuisance *per se*, or to restrict it within unreasonable limits, is to interdict the prosecution of a lawful enterprise and practically to confiscate property of inconceivable value.[80] Should any such stringent rule be invoked in regard to either quartz or hydraulic mining, the industry would be abandoned, awaiting the advent of the magician who will separate gold and silver from the earth and rocks without the aid of water.

We think the decisions in the California cases have been generally followed by the courts in the mining regions. The hydraulic questions have not been as prominent in the other states and territories as in California. Most of the litigation encountered elsewhere has arisen out of injuries from depositing tailings and debris upon the lands of others, not involving necessarily the law of riparian rights or the rights of subsequent appropriators on the same stream; and even cases of this character are comparatively few in number. They remain to be considered in a succeeding section.[81]

[79] Brown v. Gold Coin Min. Co., 48 Or. 277, 86 Pac. 361, 365.

[80] Prevoet v. Bailey (Or.), 121 Pac. 961, 963.

[81] *Post*, § 843.

A decision of the court of appeals of the state of Colorado in the case of Suffolk Gold M. & M. Co. v. San Miguel Cons. M. & M. Co.[82] invites attention.

The Suffolk company erected a stamp-mill on a stream and diverted part of the water there flowing, for the purpose of motive power and supplying the mill batteries. After so using, the water was returned to the stream through means of a ditch. As discharged from the Suffolk works it necessarily carried in suspension to the stream below pulverized quartz and pulp in the form of tailings. The Suffolk company's appropriation was prior in point of time. The San Miguel company, a subsequent appropriator of the waters of the stream lower down, utilized such waters for the purpose of generating electricity and transmitting it for use at the mines and in the town of Telluride. The waters were carried through a pipe and discharged upon a Pelton water-wheel. The presence in suspension in the water of the particles of pulp, sand, and grit from the Suffolk mill had the effect of wearing away the nozzel and iron buckets of the San Miguel's water-wheel and causing injury of a similar character to the pipe-line. The San Miguel company applied for an injunction to restrain the pollution of the stream. There was no pretense that the Suffolk company was conducting its operations maliciously or recklessly; but the court found that it might, with little expense, impound the tailings and return the water to the stream in such a state as not to interfere with the San Miguel's enterprise, and that it was its duty to do so.[83] An injunction was granted.

[82] 9 Colo. App. 407, 48 Pac. 828.

[83] For a somewhat similar case where similar dams were suggested as a means of obviating the difficulty, see Brown v. Gold Coin Min. Co., 48 Or. 277, 86 Pac. 361. See, also, Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. 465; affirmed, 33 Sup. Ct. Rep. 1004.

The court was very guarded in its opinion, and was evidently oppressed with the fear that its decision might be misconstrued and improperly applied.

It seems to us that this is a resurrection of the "phantom of riparian rights"[84] in a state where, by a consistent line of decisions, it has been effectually exorcised.

Were the decision one emanating from a court in Great Britain, where no right of appropriation is recognized, it would occasion neither comment nor surprise. It has been held there that one using water for condensing purposes has a right to insist that his upper neighbor shall not discharge it from his works at an increased temperature,[85] and that a lower proprietor engaged in the manufacture of distilled spirits was entitled to relief in equity against the upper proprietor increasing the hardness of the water by discharging into the stream water pumped from his mine.[86]

Is the decision of the Colorado court of appeals in full harmony with Atchison v. Peterson,[87] wherein the supreme court of the United States upheld a decree which practically compelled the subsequent appropriator to impound the water as it came from the upper proprietor, permit the matter in suspension to settle, and then "flush" his reservoir each day?

These suggestions are deferentially made. We appreciate the embarrassments which the courts encounter when dealing with these questions, and recognize that much depends upon the circumstances surrounding each particular case. The danger lies in an erroneous application of precedents which do not

[84] Judge Beatty in Drake v. Earhart, 2 Idaho, 716, 23 Pac. 541, 542.

[85] Tapping v. Eckersley, 2 Kay & J. 264.

[86] Bankier Distilling Co. v. Young, 19 R. 1083; affirmed, 20 R. H. L. 76.

[87] 20 Wall. 507, 516, 22 L. ed. 414, 1 Morr. Min. Rep. 583.

purport to enunciate general rules to instances where the facts are materially different.[88]

It would not be contended for a moment, where a prior appropriator of a virgin stream was engaged in supplying the inhabitants of a village with water for domestic and culinary purposes, that a subsequent appropriator on the same stream, for mining purposes, would be permitted to so pollute the entire stream as to render it unfit and unwholesome for human use.[89]

Nor could it be plausibly asserted that where the miner is the first appropriator, the next comer, who desired to make a profit by supplying cities and towns with drinking-water, could compel the miner to cease his usual and customary method of working, and deliver the water to his neighbor below in the same state of absolute purity as he received it. Such a doctrine would be wholly incompatible with the ordinary use of water for mining purposes, and in direct antagonism to the liberal principles established and maintained by repeated decisions of the highest courts in the land.

In an early California case[90] it is said that in controversies in the mining regions between prior and subsequent appropriators of water, the question to be determined is, Has the use and enjoyment of the water, for the purpose for which the first appropriator claims it, been impaired by the acts of the subsequent claimant? This is always a question for the jury.[91]

[88] Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, 418; Travis Placer M. Co. v. Mills, 94 Fed. 909, 910, 37 C. C. A. 536; Otaheite G. & S. M. Co. v. Dean, 102 Fed. 929.

[89] Crane v. Winsor, 2 Utah, 248, 11 Morr. Min. Rep. 69; Travis Placer M. Co. v. Mills, 94 Fed. 909, 910, 37 C. C. A. 536.

[90] Hill v. Smith, 27 Cal. 476, 483, 4 Morr. Min. Rep. 597.

[91] Id. 483.

The general rules as to the relative rights between prior and subsequent appropriators are thus succinctly laid down by the supreme court of Arizona in a recent case[92] as follows: Under the doctrine of appropriation, he who is first in time is first in right, and so long as he continues to apply the water to a beneficial use subsequent appropriators may not deprive him of the rights his appropriation gives, either by diminishing the quantity or deteriorating the quality; that the agriculturalist may not captiously complain of the reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable; that a court of equity will not interfere with mining industries because they cause slight inconveniences or occasional annoyances, or even some degree of interference, so long as they do no substantial damage; that, on the other hand, to permit a subsequent appropriator to so pollute or burden a steam with debris as to render it substantially less available to the prior appropriator, causes the latter to lose the rights he gained by his appropriation as readily as would the diversion of a portion of the water which he appropriated.

If the use of the stream by the miner or upper appropriator is fraught with such detrimental consequences to the waters thereof that it constitutes a public nuisance, the common-law rule adopted in almost all the American jurisdictions is that it may be abated by the state at any time.[93] The weight of authority

[92] Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. 465, 469; affirmed, 33 Sup. Ct. Rep. 1004.

[93] Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753, 811, 9 Saw. 441; People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1150, 1151; Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149. See Barnes v. Ducktown S. C. & Iron Co. (Tenn.), 60 S. W. 593, 600; Weeks-Thorn Paper Co. v. Glenside Woolen Mills, 64 Misc. Rep.

is in favor of the doctrine that a public nuisance may also be abated, or its commission enjoined, by any private individual who by reason of it sustains, or would sustain, a special injury, irrespective of the lapse of time.[94]

On the other hand, in the case of a mere private nuisance by continuing it under the proper conditions recognized by the law for the prescribed period of time, a right becomes vested by prescription, and thenceforth it is in itself lawful.[95] But, while a miner may, under certain circumstances, acquire a right by prescription to use the waters of a stream for the purpose of discharging waste therein, he cannot acquire a prescriptive right to flood the lands of a lower riparian proprietor with debris to the detriment of the soil and the consequent deterioration of its value.[96]

**§ 842. The remedy by injunction to prevent pollution of water and deposit of tailings.**—The ordinary rule in reference to the abatement of private nuisances and the remedy by injunction to prevent their continuance are too well known to require elaboration in this treatise. It may be noted, however, in dealing with the subject of pollution of water through mining

205, 118 N. Y. Supp. 1027. This rule has been abrogated by statute in Kentucky. Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S. W. 56, 58.

[94] Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. 753, 783, 9 Saw. 441; Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149. See, also, Mayor v. Land, 137 Ala. 538, 34 South. 613, 615; Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; Weeks-Thorn Paper Co. v. Glenside W. Mills, 64 Misc. Rep. 205, 118 N. Y. Supp. 1027.

[95] Woodruff v. North Bloomfield Min. Co., *supra*. See, also, Washburn on Real Property, 6th ed., sec. 1303.

[96] Skipwith v. Albemarle Soapstone Co., 185 Fed. 15, 18, 107 C. C. A. 119. See, also, Carson v. Hayes, 39 Or. 97, 65 Pac. 814, 816.

operations, that an injury arising from the deposit of tailings in running streams may be actionable, and at the same time may not, under all circumstances, justify a court of equity in granting an injunction.

It is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. Where the injury is merely temporary and trifling, and not permanent and serious, the writ will be refused; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it.[97]

The supreme court of Alabama has said that in determining this question the court should weigh the injury that may accrue to the one or to the other party, and also to the public, by granting or refusing the injunction.[98]

The question of the relative injury to the parties to the litigation as a determinative factor in the issuance of an injunction has, in recent years, been urged upon the attention of both state and federal courts, with particular emphasis, in cases involving the abatement of injuries occasioned to farming and agricultural lands by the pollution of water, as well as air, and the depositing of mining debris thereon as a result of the working of mines, smelters and reduction works, and the consequent enforced cessation of operations of great financial magnitude in the exploitation of those industries, leading to their complete abandonment in certain sections of the country. Such a result, it has been contended, should not be sanctioned by judicial decree, because of the unimportance and insignificance

[97] Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192; Goldsmith v. Tunbridge Wells Impt. Co., L. R. 1 Ch. App. 354; Parker v. Furlong, 37 Or. 248, 62 Pac. 490.

[98] Clifton Iron Co. v. Dye, 87 Ala. 468, 470, 6 South. 192, 193.

of the injury to the complaining farmers, agriculturalists and horticulturalists as compared with the great financial loss sustained by the mine and smelter operators, and that the "superior interests" of the latter should receive the protection of a court of equity as against the attacks of the former, who should be relegated solely to the courts of law for the recovery of any damage sustained in the premises.

The answer to this contention has led to an interesting conflict of authority, most of the state and federal tribunals before whom the question has been raised repudiating emphatically what may be called "the superior interest" doctrine, while some of the later federal decisions uphold it as decisive.

In the comparatively early California case of Woodruff v. North Bloomfield Gravel Mining Co.,[99] Judge Sawyer, in passing upon this contention, uses the following forceful language:—

> Of course, great interests should not be overthrown on trifling, or frivolous grounds, as where the maxim *De minimis non curat lex* is applicable, but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.

This view has been approved and adopted by the supreme court of Arizona in Arizona Copper Co. v.

[99] 18 Fed. 753, p. 801, 9 Saw. 44.

Gillespie,[100] in sustaining an injunction in favor of Gillespie, who was engaged in farming in the upper Gila Valley, against the defendant mining company, notwithstanding the claim of the latter that the effect of the order of the court would be to stop the operation of its extensive works, deprive thousands of persons of employment and cause loss and distress to a great number of people.

The same position was taken by Judge Marshall, District Judge, sitting in the ninth circuit, in a case arising in the state of Utah,[1] in which a number of farmers obtained an injunction to abate the smelter operations of the defendant mining company, because of the damage caused by the escape and diffusion of noxious fumes and dust, and the consequent precipitation upon the farming lands of the plaintiffs of dust and sulphuric acid, injuring the vegetation and the stock feeding thereon, a type of a class of cases analogous in their underlying facts and the principles of law governing them to the debris and water pollution cases.

Judge Marshall, in stating and answering the claim advanced by the defendant that an injunction should not issue because of the comparatively small financial interests of the plaintiffs as compared with that of the defendant, expresses himself as follows:—

> The substantial contention of the defendant is that it is engaged in a business of much extent and involving such a large capital that the value of the plaintiffs' rights sought to be protected is relatively small, and that therefore an injunction, destroying the defendant's business, would inflict a much greater injury on it than it would confer benefit upon the plaintiffs. Under such circumstances, it

100 12 Ariz. 190, 100 Pac. 465, 470; affirmed, 33 Sup. Ct. Rep. 1004.

1 McCleery v. Highland Boy Gold Mining Co., 140 Fed. 951.

is asserted, courts of equity refuse to protect legal rights by injunction and remit the injured party to the partial relief to be obtained in actions at law. Stated in another way, the claim in effect is that one wrongfully invading the legal rights of his neighbor will be permitted by a court of equity to continue the wrong indefinitely on condition that he invests sufficient capital in the undertaking.

I am unable to accede to this statement of the law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail. As a substitute it would be declared that private property is held on the condition that it may be taken by any person who can make a more profitable use of it, provided that such person shall be answerable in damage to the former owner for his injury. In a state of society the rights of the individual must to some extent be sacrificed to the rights of the social body; but this does not warrant the forcible taking of property from a man of small means to give it to the wealthy man, on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights.[2]

This doctrine has recently been emphatically reaffirmed by the supreme court of the state of California in Hurlbert v. California Portland Cement Co.,[3] where the whole field of judicial discussion of the subject, beginning with the North Bloomfield Gravel Mining case, *supra,* is exhaustively reviewed.

Opposed to this view there are a number of adjudications which maintain that it is entirely proper for

[2] McCleery v. Highland Boy Gold M. Co., 140 Fed. 950, 952. See, also, dissenting opinion of Judge Hawley in Mountain Copper Co. v. United States, 142 Fed. 625, 73 C. C. A. 621.

[3] 161 Cal. 239, 251, 118 Pac. 928, 933.

and incumbent upon the court to give due consideration to the comparative injury which will result from the granting or refusal of an injunction in this class of cases.

In McCarthy v. Bunker Hill & Sullivan Mining & S. Co.,[4] brought to enjoin the dumping of mining debris into the Coeur d'Alene river to prevent the pollution of its waters and the depositing of such debris upon the farming and agricultural lands of the plaintiffs, the circuit court of the ninth circuit, speaking through Beatty, District Judge, enunciated its position on the subject in the following manner:—

> Another important matter for consideration is the relative injury to the parties to the litigation. The granting of injunctions is generally somewhat within the discretion of the court. All the circumstances must be considered. It is true that there are many complainants, with a large aggregate interest in farming lands to which the damage from defendant's operations may be very great, and certainly will be, if complainants' allegations are true. On the contrary, if this injunction is granted, it must result in the closing, not only of the mills, but also of the mines. Generally the ores are of such low grade that they cannot profitably be shipped until concentrated; hence the mills must be operated. If they are, the water used in them must finally reach the said river, bearing such sediment as it is impossible to impound in the reservoirs. The court must consider the consequences of closing the mills and mines. It must bear in mind the very great hardship and loss to the defendants. They have many millions of dollars invested in their properties and are now conducting an immense business, which is not only of much profit to them, but also of great business interest to others. But of equal consideration is the fact that it would deprive

[4] 147 Fed. 981, 984.

thousands of laborers of employment who are now earning good wages; also there are many others engaged in various avocations who would be seriously affected. I presume it is safe to say that there are ten thousand to twelve thousand people who are now earning a livelihood through the operation of these mines and mills, all of whom would be seriously injured by an injunction. The court will long hesitate before taking such a drastic mode of guarding complainants' interest, as would result in incalculable injury, not only to defendants, but also to large communities.

The decision of the circuit court in this case was upheld by the circuit court of appeals, and the ruling of the court below on this point approved.[5]

The same line of reasoning is followed in several other cases of like character growing particularly out of smelter operations.[6]

If it is the proper province of a court of equity to permit the question of "the greatest good to the greatest number" to be of controlling force in any case, it would appear that these cases rest at least upon a plausible foundation, and that they keep step with the advanced industrial conditions of the present day, but it is readily apparent that the doctrine laid down should only be the rule of decision in cases where, as in the McCarthy case, the facts lead to the inevitable conclusion that a contrary holding would

[5] McCarthy v. Bunker Hill & Sullivan Mining & S. Co., 164 Fed. 927, 92 C. C. A. 259.

[6] Mountain Copper Co. v. United States, 142 Fed. 625, 640, 73 C. C. A. 621; Bliss v. Anaconda Copper Co., 167 Fed. 342, 367; Bliss v. Washoe Copper Co., 186 Fed. 789, 827, 109 C. C. A. 133; Magone v. Colorado Smelting & Mining Co., Rep. Proc. Am. Min. Cong. (Denver 1906), 251, Eng. & M. Journal, vol. 87 (1909), 885. See, also, City of New York v. Pine, 185 U. S. 93, 102, 22 Sup. Ct. Rep. 592, 46 L. ed. 820.

result in incalculable injury not only to the immediate parties in interest, but also to large communities. We are constrained to believe that the doctrines of "superior interests" and "balancing of conveniences" where injunctive relief is sought will eventually become matters of serious consideration. These doctrines will inevitably be extended, as have the rules on the subject of "Eminent Domain," discussed in a previous chapter of this treatise, wherein we have traced the evolution of "public use" to the rule of "public welfare."

The court should consider the necessity or importance of the right claimed, as well as the injury likely to be caused to the complaining party.[7]

The court will also, of course, always take into serious consideration the conduct and attitude of the parties complaining, and where it appears that there was a lack of reasonable diligence in seeking the aid of a court of equity to arrest the detrimental operations, an injunction will be refused and the party relegated to his remedy at law for damages.[8]

**§ 843. The deposit of tailings and refuse on the lands of others.**—While the deposit of mine tailings in running streams to a reasonable extent is permitted, subject to the limitations outlined in the preceding sections, the doctrine never has been extended so as to authorize the miner to flood his neighbor's lands, and by depositing thereon mining debris and "slickens"

[7] Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105.

[8] Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192, 193; New York City v. Pine, 185 U. S. 93, 100, 22 Sup. Ct. Rep. 592, 46 L. ed. 820; McCleery v. Highland Boy Gold Min. Co., 140 Fed. 951, 954; McCarthy v. Bunker Hill & Sullivan M. & C. Co., 147 Fed. 981, 984, 164 Fed. 927, 940, 92 C. C. A. 259.

deprive such neighbor of any substantial right or depreciate the value of his property.

> No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand, or gravel, or other material so as to render it valueless.[9]

While the miner is entitled to the free use of the channel for the purpose of carrying away his waste and tailings, he has no right to fill the channel with debris, causing the stream to overflow, and thus deposit the material on the lands of the lower proprietor.[10]

The miner is entitled to use his claim in a lawful manner, but no use can be considered lawful which precludes others from enjoying their rights.[11]

However cautiously or carefully the miner works is of no consequence, for if his work in fact injures another he is none the less liable.[12]

The doctrine of necessity, which has been frequently invoked in justification of injuries of this character, has no application.[13] Under certain circumstances a person may have a right of way by necessity over the land of another; but the doctrine that one person may have a right of necessity to go upon the land of another and erect thereon buildings, or other structures,

[9] Hobbs v. Amador & Sacramento Canal Co., 66 Cal. 161, 4 Pac. 1147, 1148; Carson v. Hayes, 39 Or. 97, 65 Pac. 814, 817; Good v. West Min. Co. (Mo. App.), 136 S. W. 241, 243.

[10] Nelson v. O'Neal, 1 Mont. 284, 4 Morr. Min. Rep. 275.

[11] Logan v. Driscoll, 19 Cal. 623, 626, 81 Am. Dec. 90, 2 Morr. Min. Rep. 172; Carson v. Hayes, 39 Or. 97, 65 Pac. 814, 817.

[12] Hill v. Smith, 27 Cal. 476, 481, 4 Morr. Min. Rep. 597; Levaroni v. Miller, 34 Cal. 231, 234, 91 Am. Dec. 692, 12 Morr. Min. Rep. 232; Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, 418; Salstrom v. Orleans Bar G. M. Co., 153 Cal. 551, 96 Pac. 292.

[13] Carson v. Hayes, 39 Or. 97, 65 Pac. 814, 817; York v. Davidson, 39 Or. 81, 65 Pac. 819, 821.

such as flumes and ditches from which tailings are discharged, has never been recognized.[14]

This doctrine is peculiar to no locality. It is one of universal application. A few illustrations will suffice to demonstrate this.

In the case of Columbus and Hocking Coal and Iron Company v. Tucker, considered by the supreme court of the state of Ohio,[15] the following facts appeared:—

Plaintiff owned a tract of land in the Hocking valley, through which flowed Monday creek. The channel of this creek, until after the acts of the coal company, had been of sufficient capacity to carry its waters except during unusual freshets. The defendant placed the slack, dirt, and other refuse from its mine at such place upon its lands that they were carried off by various natural streams emptying into Monday creek, and the effect of their being emptied into this latter creek was the filling of its channels through the plaintiff's farm, causing it to overflow its banks, inundating plaintiff's land, covering a portion thereof with debris, and rendering it valueless.

The defendant insisted that its mining operations were conducted in a prudent and careful manner, and in the mode generally employed in operating similar mines in the neighborhood; that its acts were not characterized by any malice or negligence toward the plaintiff; that the deposits made upon its own land were upon the only available places on which they could be deposited so as to continue carrying on the business of mining for coal. Said the court:—

> The claim of the company that it had the right to make the deposits in the places complained of, be-

[14] Esmond v. Chew, 15 Cal. 137, 143, 5 Morr. Min. Rep. 175. See, also, Ralston v. Plowman, 1 Idaho, 595, 5 Morr. Min. Rep. 160.

[15] 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630, 633.

cause it was necessary to the successful conduct of its own business, seems wanting in substance. The effect is to measure the rights of the plaintiff in his lands and the waters of Monday creek by the convenience or necessity of the company's business. An owner of land in Ohio is not subject to any such narrow and arbitrary rule.

In considering a parallel case, the supreme court of California said:—

> The refuse matter was the product of the defendant's mining operations, and was deposited in the creek through agencies controlled by the defendant; and although it was not responsible for the inundation of the plaintiff's land by the water of said creek, it was responsible for the deposit of the deleterious substances with which said water was charged through its agency upon said land. This does not in any manner involve the question of the defendant's right to mine or prosecute any other legitimate business on its premises. It would not be claimed that the defendant could convey and deposit refuse matter from its mine by means of carts or cars, without incurring liability for any damages which the plaintiff might suffer by reason thereof. And we know of no principle upon which it could be held that a person may escape liability by doing that indirectly which would render him liable if done directly.[16]

Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, so as to effectually destroy or impair its usefulness, it is a taking of the property without compensation.[17]

[16] Robinson v. Black Diamond Coal Co., 57 Cal. 412, 413, 40 Am. Rep. 118, 14 Morr. Min. Rep. 93. See, also, Hobbs v. Amador & Sacramento Canal Co., 66 Cal. 161, 4 Pac. 1147, 1148; Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, 418; Good v. West Min. Co., 154 Mo. App. 591, 136 S. W. 241, 243.

[17] Pumpelly v. Green Bay Co., 13 Wall. (U. S.) 166, 177, 20 L. ed.

The early customs of the western miners which were recognized and confirmed by the courts, both state and federal, never sanctioned any such taking. Where a place of deposit for tailings was necessary for the fair working of a mine, the miner had a right to appropriate unoccupied public land for the purpose, provided he did not interfere with existing rights, and those who came after him took subject to his prior privilege.[18]

But this was the extent of the rule. While the right to foul the waters of a stream with mining debris to a reasonable extent may be asserted under custom, as in the case of tin streaming in Cornwall,[19] yet the law will not allow such a custom to take away and destroy the lands of others by depositing over the surface sand and debris. The custom of "free tailings" cannot be invoked to relieve one from liability for injuries thus occurring.

A mining custom which would allow the total destruction of a junior locator's mining operations, in a gulch below prior locators, on ground which was vacant, cannot be maintained under any statute or common mining law with which we are acquainted.[20]

Whenever a court of equity is asked for an injunction in cases of such a nature, it must have regard

557; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Arimond v. Green Bay Co., 31 Wis. 316; Rowe v. Portsmouth, 56 N. H. 291, 22 Am. Rep. 464; Woodward v. Worcester, 121 Mass. 245,; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. 465, 469.

[18] Jones v. Jackson, 9 Cal. 238, 244, 14 Morr. Min. Rep. 72; O'Keife v. Cunningham, 9 Cal. 589, 9 Morr. Min. Rep. 451; Blair v. Boswell, 37 Or. 168, 61 Pac. 341.

[19] Carlyon v. Lovering, 1 Hurl. & N. 784, 26 L. J. Ex. 251, 14 Morr. Min. Rep. 397.

[20] Lincoln v. Rodgers, 1 Mont. 217, 224, 14 Morr. Min. Rep. 79. See, also, Ralston v. Plowman, 1 Idaho, 595, 5 Morr. Min. Rep. 160; Fuller v. Swan River etc. Co., 12 Colo. 12, 14, 19 Pac. 836, 837, 16 Morr. Min. Rep. 252; Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, 417.

not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances.[21]

A case illustrative of this principle came before the supreme court of Michigan. A man bought for speculation certain bottom lands, upon which large quantities of sand were being deposited by a stream which operated a stamp-mill higher up. He put a valuation upon the land from three to five times what it cost him, and tried to sell it to the corporation which owned the mill, but it declined to buy. Then he prayed for an injunction to restrain the corporation from sanding his land and polluting the stream. The supreme court, speaking through Judge Cooley, held that an injunction would not lie, and that the speculator was entitled to such remedy as the law would give him and no more.[22]

It has been said by the supreme court of Montana that it would require a very strong case to justify the granting of an injunction, when such an act would cause infinitely more damage than it would prevent.[23]

An injunction will be granted where its denial is tantamount to the denial of all protection;[24] but it may be refused where the injury complained of is comparatively trifling.[25]

[21] Wood v. Sutcliffe, 2 Sim., N. S., 163, 16 Jur. 75, 8 Eng. Law & Eq. 217, 221.

[22] Edwards v. Allouez M. Co., 38 Mich. 46, 31 Am. Rep. 301, 7 Morr. Min. Rep. 577.

[23] Atchison v. Peterson, 1 Mont. 561, 570. See, also, Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, 418.

[24] Henshaw v. Clark, 14 Cal. 461, 464, 14 Morr. Min. Rep. 434.

[25] Jerome v. Ross, 7 Johns. Ch. (N. Y.) 334. See, also, Slade v. Sullivan, 17 Cal. 103, 106, 7 Morr. Min. Rep. 519; Jacob v. Day, 111 Cal. 571, 44 Pac. 243, 246; United States v. North Bloomfield G. M. Co., 53 Fed. 625, 632.

In Colorado it is provided by statute that,—

> In no case shall any person or persons be allowed to flood the property of another person with water, or wash down the tailings of his or their sluice upon the claim or property of other persons, but it shall be the duty of every miner to take care of his own tailings, or become responsible for all damages that may arise therefrom.[26]

This, we apprehend, is nothing more than declaratory of the law as it existed prior to this enactment. It does not inhibit the use of the channel of the stream in a reasonable way to carry off tailings.

As was said by the supreme court of the United States,—

> No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another.[27]

This we understand to be fully supported by the California debris cases.[28]

As was said by the supreme court of California in People v. Gold Run Ditch and Mining Co.,[29]—

> Undoubtedly the fact must be recognized, that in the mining regions of the state the custom of making use of the waters of streams as outlets for mining debris has prevailed for many years; and as a custom it may be conceded to have been founded in necessity, for without it hydraulic mining could not have been economically operated. In that cus-

[26] Mills' Annot. Stats., § 2393; Rev. Stats. 1908, § 4214.

[27] Jennison v. Kirk, 98 U. S. 453, 461, 25 L. ed. 240, 4 Morr. Min. Rep. 504.

[28] Woodruff v. North Bloomfield G. M. Co., 9 Saw. 441, 18 Fed. 753; People v. Gold Run D. & M. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152, 1159; Hardt v. Liberty Hill, 11 Saw. 611, 27 Fed. 788, 793; Yuba County v. Kate Hayes M. Co., 141 Cal. 360, 74 Pac. 1049, 1050.

[29] 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1149, 1150, followed in Carson v. Hayes, 39 Or. 97, 65 Pac. 814, 817.

tom the people of the state have silently acquiesced, and upon the strength of it mining operations, involving the investment and expenditure of a large capital, have grown into a legitimate business, entitled equally with all other business pursuits in the state to the protection of the law; but a legitimate private business founded upon a local custom may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops into that condition the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner.

The rule is undoubtedly correctly stated by the supreme court of Ohio:—

Upon reason we think the proposition sound, that where no right by prescription exists to carry on a particular business in a particular manner at a particular place, and the natural result of the place selected and the manner adopted is to cause material injury to the property rights of another, it is not a sufficient defense to an action for damages to show that the locality where it is carried on is one generally in use by persons in such business, and the manner in which it is carried on is commonly adopted by others in such business. Even though it appear that the use made of the land, while not the common ordinary use of land as such, is not an unnatural nor improper one in and of itself, nor even an unusual one, and the proposition will be found sustained by abundant authority.[30]

The doctrine of the authorities is that each mine owner or appropriator must take care of his own mining debris, and he can acquire no right by custom or otherwise to use the land of his neighbor as a dumping-ground without his consent, either by

[30] Columbus & Hocking C. & I. Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630, 633.

carrying and depositing the debris thereon, or by casting it into the stream and allowing it to be washed down by the force of the current.[31]

That others engaged in like business have been accustomed to disregard the rights of their neighbors can furnish no justification.

The general doctrine herein announced applies not only to refuse deposited on another's land by means of water, but to all other processes by which foreign material is conducted to the premises of another and there deposited to his detriment and injury. There is no difference in principle between transporting such material by rail and by water.

**§ 844. Measure of damages for unlawfully depositing debris on another's land.**—The general rules governing the question of determining the measure of damages where mining debris is deposited on the mining or agricultural land of another seem to be that when the reasonable cost of repairing the injury, or of restoring the land to its former condition, is less than what the diminution of the market value of the whole property by reason of the injury is shown to be, such cost of restoration is the proper measure of damages. On the other hand, when the cost of restoring it is more than such diminution, the latter is, generally speaking, the true measure of damages. The loss of the use of the property during the period of restoration may also be a proper element in determining the damages.[32]

[31] Carson v. Hayes, 39 Or. 97, 65 Pac. 814, 817. See, also, Fitzpatrick v. Montgomery, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, 417.

[32] Hartshorn v. Chaddock, 135 N. Y. 116, 31 N. E. 997, 998, 70 L. R. A. 426.

The value of destroyed growing crops is, of course, also a proper element of damage.[33]

In the case of Salstrom v. Orleans Bar Gold M. Co.,[34] by reason of defendant's mining operations, a portion of the plaintiff's land, with a growing crop of grain thereon, was washed away, and this portion of the land was covered with a deep deposit of gravel and boulders. A part of the land thus covered by the debris was available for mining purposes and the other portion was used for agricultural purposes. The supreme court of the state of California states the true rule of damages in such a case as follows:—

> Plaintiffs were first entitled to the value of the growing crop destroyed. As to the land available exclusively for mining purposes, if the cost of repairing the injury or removing the debris deposited by defendant would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damage. But if such cost of repair or restoration would exceed such value, then the value of the property would be the proper measure.[35] As to the land used for agricultural purposes, if such land had a greater value for mining purposes than agricultural purposes, the same rule would apply as in the case of the other land; and, on the other hand, if it was more valuable for agricultural than mining purposes, it having been absolutely destroyed for such purpose, plaintiffs would be entitled to the value testified to by the plaintiffs.[36]

33 Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 Pac. 292, 295.

34 *Supra.*

35 Citing with approval Hartshorn v. Chaddock, *supra.*

36 Id. 153 Cal. 558, 96 Pac. 296. See, also, Wood on Nuisances, p. 1318, and cases cited in note 5. See, also, Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. 463.

When the injury is only partial and the nuisance is one which may be abated by injunction, or for the continuance of which successive actions may be brought, the measure would be the same as in case of flooding; that is, the loss sustained by the continuance of the nuisance to the rental value of the property, and not the difference between its market value as an absolute estate before and after the nuisance.[37]

[37] Pinney v. Berry, 61 Mo. 359, 367; Chicago v. Huenerbein, 85 Ill. 544, 28 Am. Rep. 626; Carli v. Union Depot R. R. Co., 32 Minn. 101, 20 N. W. 89, 90; City of South Bend v. Paxon, 67 Ind. 228; Willey v. Hunter, 57 Vt. 479; 2 Wood on Nuisances, p. 1318, and cases cited in note 6.

# CHAPTER V.

## GOVERNMENTAL SUPERVISION OF HYDRAULIC MINING IN CALIFORNIA—THE CALIFORNIA DEBRIS COMMISSION—ITS JURISDICTION AND POWERS.


§ 848. Causes leading up to the passage by congress of the act creating the California debris commission.

§ 849. Hydraulic mining not a nuisance *per se* — Principles established by the debris cases.

§ 850. Essential features of the congressional act creating the California debris commission and regulating hydraulic mining in the state of California.

§ 851. Necessity for definition of term "hydraulic mining."

§ 852. What constitutes "hydraulic mining," or "mining by the hydraulic process," within the meaning of the act.

§ 853. Judicial interpretation of the act—Its constitutionality.


**§ 848. Causes leading up to the passage by congress of the act creating the California debris commission.**—Mining in the United States is not a governmental function. As a rule, the government does not interfere with it, looking upon it as a private industry, to be carried on by private enterprise, subject to the same general rules regulating its conduct as apply to other industries; but in California we have a novel instance of governmental intervention in the nature of police regulation, an anomaly in the federal mining system which deserves more than a passing notice. While the geographical scope of its operation is limited to that portion of the watershed of the Sierra Nevada mountains representing the drainage areas of the principal navigable rivers of the state, the San Joaquin and the Sacramento, within this area is embraced not only the field of early placer mining, but by far the greater portion of the known auriferous

gravel deposits of that marvelous state. The passage of the act of congress creating the California debris commission, and the causes which led up to it, are matters of current history.

In the early days of placer mining in California, that industry was the paramount one. Everything else was subservient to its necessities and dependent upon its successful operation. While agricultural and pastoral pursuits were carried on to some extent, they were mere auxiliaries and the bases of supplies for the mining communities. The farmers and stock-raisers produced, and the miners consumed. Waters of the running streams were appropriated, diverted from their natural courses, and utilized in winning the precious metals from the alluvial soils of the foothills and mountains. Streams were employed in carrying the resultant waste and debris, the coarser material finding lodgment near the scene of active operations and the finer carried in suspension to the channels of the navigable rivers, there to be deposited along the banks and in the beds, or else to be transmitted to the silent depths of the ocean, there to form the fine-grained slates and clays of future geological ages.

This process of sedimentation, at first gradual and almost inappreciable, grew with the years. The primitive methods of washing the auriferous gravels by the use of the "long tom" and rocker were succeeded, first, by applying water to the natural banks under moderate pressure, through the medium of canvas or rubber hose, with a nozzle of moderate dimensions, then by the powerful engines of demolition,—the "little giants" and "monitors,"—through the large converging nozzles of which water was forced under enormous pressure and directed against the banks, bringing down in great volume, boulders, rocks, gravel, and the

finer disintegrated substances, such as sand, silt, and slickens. Natural erosion, the denudation of the forests laying bare large surface areas to the direct action of the elements, and the extension of farming operations into the foothill regions also contributed, in some degree at least, to overtaxing the carrying power of the running streams. By these combined processes, natural and artificial, the channels of the rivers became clogged. The heavier material, washed from the natural banks by the hydraulic miners, was lodged within reach of the streams, overflowing their banks in seasons of extraordinary floods, and lands below were in places buried beneath the debris brought down by the mountain torrents. The story is graphically described in what is known as the "debris cases," particularly in Woodruff v. North Bloomfield Gold Mining Co.[1] and in People v. Gold Run Ditch and Mining Co.[2]

Farms and orchards were destroyed, and the industry of hydraulic mining as thus conducted became more than a menace. Under these conditions, land owners in the valleys organized, and through their efforts the courts interfered, injunctions were issued and made permanent, inhibiting to a great extent the conduct of hydraulic mining, and stopping what Colonel Mendell, the government engineer, styled the "irruption of the mountains."

Private individuals claiming to have suffered special damage arising out of the commission and continuance of a public nuisance,[3] the state asserting an unauthorized encroachment upon and interference with its

[1] 9 Saw. 441, 18 Fed. 753, 756.

[2] 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

[3] Woodruff v. North Bloomfield G. M. Co., 9 Saw. 441, 18 Fed. 753.

water highways,[4] and the government claiming that its right of navigation was being seriously obstructed,[5] invoked the aid of the courts to the temporary undoing of hydraulic mining on the extensive scale theretofore practiced. The legal struggle was a battle of giants. The question became one of great public importance. It divided communities, was discussed in platforms of political parties, and ultimately found its way into the halls of congress.

During the trial of the cases the only remedy for the evil suggested was the construction of restraining dams, behind which the heavier material might be impounded, allowing the coarser substances to settle at the bottom of artificially constructed reservoirs, the finer silt, being comparatively harmless, passing over the dam and being carried seaward.[6]

In the hope that some mode might be devised for obviating the injuries, a clause was inserted by the United States circuit court in the decrees, giving leave on any future occasion, when some plan had been successfully executed, to apply to the court for a modification of the injunction; but when dams were constructed and application was made to vacate the injunction and permit the resumption of mining behind them, controversies arose over their efficiency for the purpose intended. Engineers disagreed as to the restraining power of the dams. They had been built under competent scientific supervision at large expense; but the farmers contended they were perpetual menaces, and supported their contention with expert testimony.

[4] People v. Gold Run D. & M. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

[5] United States v. North Bloomfield G. M. Co., 53 Fed. 625.

[6] Id.

The court, considering that if any such dams were to be accepted they should only be those whose ample sufficiency was established upon testimony of the most unquestionable and satisfactory character, declined to accept those concerning which there was a difference of opinion among engineers.[7]

The people of the affected districts appealed to congress for redress.

This is, in brief, a narrative of the events which led up to the passage of the act creating the federal board known as the California debris commission.

**§ 849. Hydraulic mining not a nuisance per se—Principles established by the debris cases.**—As was said by Judge Ross in a case instituted in the United States circuit court, ninth circuit, by the government against the North Bloomfield Company,[8]—

> In neither of the cases [theretofore decided by the circuit court] is mining by the hydraulic process regarded in, and of itself, as unlawful. That it is not unlawful, but highly useful and commendable when properly conducted, and without injury to the property or rights of others, hardly needs judicial decision. Nobody wanted gold mining by the hydraulic process stopped so long as it could be prosecuted without injury to the navigable waters or to the property or rights of others.
>
> This is a self-evident proposition.
>
> It seems to us it must be conceded, [said the supreme court of California] that the business of hydraulic mining is not within itself unlawful or necessarily injurious to others. The unlawful nature of the business results from the manner in which it is carried on, and the neglect of parties engaged

[7] Hardt v. Liberty Hill Cons. M. & W. Co., 11 Saw. 611, 27 Fed. 788, 793.

[8] United States v. North Bloomfield M. Co., 81 Fed. 243.

therein to properly care for the debris resulting therefrom, whereby it is allowed to follow the stream and eventually to cause injury to property situated below.[9]

Without entering into a detailed analysis of the debris cases, the various defenses interposed, and the reasoning employed by the courts in arriving at the conclusions reached, we will state what we understand to be the principles laid down by the courts.

(1) Hydraulic mining, conducted as heretofore described, where it contributes or threatens to contribute in a material degree to the filling up of the river channels, impairing navigation, and covering the land of others with detritus or debris, is a nuisance;

(2) Suit to enjoin such nuisance may be maintained (*a*) at the instigation of a private individual who has suffered special damage, (*b*) by the state, whose navigable waterways have been encroached upon, (*c*) or by the government, whose right of navigation and to regulate commerce has been interfered with;

(3) Such a nuisance has neither been authorized by state or national legislation nor legalized by implication, nor could it be so authorized or legalized;

(4) No right or title can be acquired by prescription to commit or continue a public nuisance;

(5) Such a nuisance cannot be authorized by custom; such a custom would be in conflict with the laws and constitution of the state, and would be illegal and void.

These principles have been accepted as a finality by the hydraulic miners of California. An appeal was

[9] County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740, 741. See, also, People v. Gold Run D. & M. Co., 66 Cal. 138, 151, 56 Am. Rep. 80, 4 Pac. 1152, 1158; Cal. Civ. Code, § 1424; North Bloomfield G. M. Co. v. United States, 88 Fed. 664, 673, 32 C. C. A. 84.

allowed to the supreme court of the United States in the leading case, but it was voluntarily abandoned.

**§ 850. Essential features of the congressional act creating the California debris commission and regulating hydraulic mining in the state of California.**—The congressional act entitled "An act to create the California debris commission and regulate hydraulic mining in the state of California," approved March 1, 1893, is printed in full in the Appendix to this treatise. It is only necessary here to note its essential features and the controversies which have arisen over its constitutionality and true interpretation.

A commission is created, consisting of three members selected by the president, with the consent of the senate, from officers of the corps of engineers of the United States army, which commission exercises its powers under the supervision of the chief of engineers and under the direction of the secretary of war. The jurisdiction of the commission, in so far as it affects mining carried on by the hydraulic process, extends to all such mining in the territory drained by the San Joaquin and Sacramento river systems. The terms "hydraulic mining" and "mining by the hydraulic process," as used in the act, are declared to have the "same meaning and application given to said terms in said state."

Hydraulic mining, as so understood and defined, directly or indirectly injuring the navigability of the river systems named, carried on in the territory over which the jurisdiction of the commission extends, other than as permitted under the provisions of the act, is prohibited and declared unlawful.

The commission is required to formulate plans for improving the navigability of all rivers comprising the

systems, deepening their channels, and protecting their banks, with a view of making the same effective as against the encroachment of, and damage from, debris resulting from mining operations, natural erosion, or other causes, and permitting mining by the hydraulic process to be carried on, provided that the same may be accomplished without injury to the navigability of the rivers, or to the lands adjacent thereto. The commission is also empowered to examine, survey, and determine the utility and practicability of storage sites for the storage of debris, with a view to the ultimate construction of impounding dams and reservoirs, and permitting hydraulic mining to be conducted behind them.

Parties desiring to work by the hydraulic process are required to submit themselves to the jurisdiction of the commission by filing a verified petition requesting the issuance of a permit, accompanied by an instrument executed and acknowledged, whereby such petitioner surrenders to the United States the right and privilege to regulate, as provided in the act and rules supplementing it, the manner and method in which the debris resulting from the working of the mine shall be restrained, and what amount shall be produced therefrom. Upon the filing of this petition the commission causes a notice, briefly specifying its contents, to be published. Pending publication, an examination is made by the commission, or a committee thereof. A hearing is had, and, if the petition is granted, an order is entered directing the method and specifying in detail the manner in which operations shall proceed, and what restraining or impounding works shall be built and maintained. These works are to be constructed under the direct supervision of the commission, but at the expense of the parties, and the

permit to commence mining is not issued until after inspection and approval of the completed work. This permit may, for cause, be revoked, or its terms modified from time to time.

This outline will serve to indicate the general features of the law and furnish a basis for illustrating the few questions which have thus far been the subject of controversy.

**§ 851. Necessity for definition of term "hydraulic mining."**—As a preliminary to the discussion of the subject of definitions, it is of some importance that attention should be directed to the necessity and object of definition. While the avowed purpose of the act of congress is to protect the navigability of the San Joaquin and Sacramento rivers, the jurisdiction of the commission does not extend to, nor has it any supervisory control over, any class of mining other than that carried on by the hydraulic process.

For illustrative purposes, we may divide mining as conducted within the territory described in the act into four classes:—

(*a*) Quartz or vein mining, where the ore extracted is crushed in stamp-mills, and the resultant tailings, reduced to the form of pulp, find their way into the running streams;

(*b*) Drift mining, where the deep placers found in subterranean channels of ancient rivers are reached by tunnels, shafts, or drifts, and the gold-bearing material resting on the bedrock is brought to the surface for treatment. If the material is cemented, it is crushed in a stamp-mill, the same as in quartz mining. If it is loose gravel, it is carried into sluices and washed by a process similar to sluice mining in surface placers;

(*c*) Sluice mining, where the material is placed by manual labor into sluice-boxes and the gold is captured in riffles;

(*d*) Hydraulic mining.

We apprehend that the distinctions between these different methods of mining have always been clearly understood, and the lines of demarcation are well defined. The scope of the congressional act and the jurisdiction of the debris commission is beyond question limited to mining by the hydraulic process. We may concede that quartz, drift, or ordinary sluice mining might be conducted in so wanton and reckless a manner as to injure, or contribute to the injury of, the navigable streams, and, for instance, it has been judicially stated in a case decided by the supreme court of the state of California[10] that mining by the "ground-sluice process" produces the same effect in kind as the hydraulic process, only to a less degree; but this fact does not bring mining by either of these methods within the inhibition of the congressional law, nor subject those engaged in it to the jurisdiction of the debris commission. All kinds of mining other than that falling within the definition of "mining by the hydraulic process" may be carried on without a permit from the debris commission, and whether in a given instance such mining is or is not carried on in such a way as to amount to a nuisance must be determined by the courts when their jurisdiction is invoked, regardless of any proceedings or lack of them before the debris commission. The situation may be thus stated in another form: No mining by the hydraulic process, however harmless in its results, carried on within the drainage

[10] Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049, 1050.

area of the Sacramento and San Joaquin river systems, is lawful, unless conducted under a permit from the debris commission.[11]

All other classes of mining may be conducted without consulting such commission, subject, of course, to the right of the courts to interfere in proper cases, where the manner of conducting is manifestly injurious to the rights of others. The necessity for determining what constituted hydraulic mining, or mining by the hydraulic process, at the time the act was passed, is therefore apparent.

**§ 852. What constitutes "hydraulic mining," or "mining by the hydraulic process," within the meaning of the act.**—The act itself, as heretofore observed, provides, "that for its purposes 'hydraulic mining' and 'mining by the hydraulic process' are hereby declared to have the meaning and application given to said terms in said state." What was the "meaning and application given" in California to these terms at the time the act was passed?

The Civil Code of California provides[12] as follows:—

> Hydraulic mining within the meaning of this title is mining by means of the application of water under pressure through a nozzle against a *natural* bank.

But this became a law after the approval of the congressional act.[13]

This section of the code, therefore, may be referred to only upon the theory that it was but a legislative

[11] United States v. North Bloomfield G. M. Co., 81 Fed. 243, 251, affirmed on appeal, S. C., 88 Fed. 664.

[12] § 1425.

[13] The congressional act was approved March 1, 1893. The amendment to the Civil Code was approved March 24, 1893, and took effect sixty days after its passage.

declaration of a definition which was commonly accepted at the time the law was passed. We have italicized the word "natural" in quoting from the code, for the reason that a controversy has arisen over the use of this word as an element of definition.

All parties seem to agree that the application of water under pressure and through a nozzle were always essential elements of definition of the terms "hydraulic mining" and "mining by the hydraulic process"; but it has been contended that unless the water is directed against a *natural* bank, one that is a part of the mass of the mountain in a state of nature, the application to it of water under pressure through a nozzle does not constitute hydraulic mining as understood in California. In other words, such application against a bank of material artificially constructed, such as a mine dump or deposit of tailings or loose gravel impounded or caved from its natural position by human agency, is not "hydraulic mining."

The California anti-debris association, representing the farming interests, contend that the term is, and always has been, sufficiently comprehensive to embrace the application of water under pressure through a nozzle to any kind of a bank or body of material, natural or artificial, where the object sought was to liberate and secure the gold.

The lexicographers afford us but little aid in determining the local signification of phrases. The definition given in the Standard Dictionary is as follows:—

> Hydraulic Mining. A method of mining, in which a bank of gold-bearing earth or gravel is washed away by a powerful jet of water and carried into sluices, where the gold separates from the earth by its specific gravity.

Dr. Henry De Groot, a writer of prominence on subjects connected with California, in his contribution to the Encyclopedia Britannica[14] on the industrial history of that state, says:—

> Hydraulic mining consists in the plan of breaking down and disintegrating the banks of auriferous gravel as they stand in place, by means of water discharged against the same in large quantity and under great pressure.

Lieut.-Col. G. H. Mendell, of the engineer corps, in his report made pursuant to the provisions of the river and harbor act of 1880, upon a project to protect the navigable rivers of California from the effects of hydraulic mining,[15] gives the following definition:—

> Hydraulic mining, as it is understood in California, is that process by which a natural bank is excavated by a jet of water and conveyed by the same water through the sluices to the dumps. Water does all the work; manual labor is needless to a perfect bank. When boulders are found too large to pass through the sluice, they are sometimes blasted into smaller pieces. Where the bank is cemented or contains masses of pipe-clay, it is shattered by charges of powder.

Hon. John S. Hittell, the most noted of writers on the subject of Californian history, thus described the process:—

> Hydraulic mining is that mining where a stream of water, led down from a considerable elevation through a hose, is thrown by the pressure with great force upon the dirt which is thus loosened, dissolved, and washed down into the sluice. . . . . Hydraulic mining is not a process of washing dirt, but of preparing it for washing.[16]

[14] Vol. 1, American Supplement, p. 690.

[15] January 26, 1882.

[16] Bancroft's Handbook of Mining, S. F., 1861.

Mr. Aug. J. Bowie, Jr., a well-known mining engineer, in his contribution to the American Institute of Mining Engineers, on the subject of hydraulic mining in California,[17] says:—

> Hydraulic mining may be defined as the act of extracting gold from gold-bearing detritus, i. e., surface deposits, placers, or washings, by means of water under great pressure, through pipes against the auriferous material.

And in his "Practical Treatise on Hydraulic Mining in California,"[18] he defines it as, "that method of gold mining in which the ground is excavated by means of water discharged against it under pressure (hydraulicking)."

Dr. R. W. Raymond, in his "Glossary of Mining Terms," contributes the following:—

> Hydraulicking. (Pac.) Washing down a bank of earth or gravel by the use of pipes conveying water under high pressure.

Prof. J. Ross Browne, in his report to the secretary of the treasury upon the mineral resources of the west,[19] tells us that the process was invented in 1852, and describes it as one

> in which a stream of water was directed under heavy pressure against a bank or hillside containing placer gold, and the earth was torn down by the fluid and carried into the sluice to be washed.

When we search for judicial definitions we are practically limited to the debris cases.

Judge Sawyer, in Woodruff v. North Bloomfield G. M. Co.,[20] gives the following:—

17 1887. Trans. Am. Inst. M. E., vol. 6, p. 38.
18 New York, 1895.
19 1867.
20 9 Saw. 441, 18 Fed. 753, 756.

Hydraulic mining, as used in this opinion, is the process by which a bank of gold-bearing earth and rock is excavated by a jet of water, discharged through a converging nozzle of a pipe, under great pressure, the earth and debris being carried away by the same water through sluices and discharged on lower levels into the natural streams and water-courses below. Where the gravel or other material of the bank is cemented, or where the bank is composed of masses of pipe-clay, it is shattered by blasting with powder, sometimes from fifteen to twenty tons of powder being used to break up a bank.

In the case of United States v. North Bloomfield Gravel Mining Co.,[21] involving the constitutionality of the congressional act, the government alleged that,—

Hydraulic mining as now, and for more than twenty years last past, practiced and understood in the state of California, is a process of gold mining by which hills, ridges, banks, and other forms of deposits of earth which contain gold, are mined and removed from their position by means of large streams of water, which, by great pressure, are forced through pipes terminating in nozzles known as "monitors" or "little giants"; that the water is discharged from such nozzles with great force, by a water pressure of from fifty to four hundred feet per second, against and upon the hills, ridges, banks, and other deposits, which are usually shattered or broken up by means of blasts of powder, and softened by running water over and along such shattered or broken banks of earth, and undermined by streams of water flowing at the foot of such banks, thus caving down and washing off portions thereof before water is discharged from the nozzles against them.

Judge Ross expressed the opinion that this allegation sufficiently set forth the meaning of the terms "hydraulic mining" and "mining by the hydraulic

[21] 81 Fed. 243, 245.

process," as these terms were used in the congressional law.

There can be no question but that in all of the debris cases the process under consideration involved to some degree the use of artificial methods to loosen the soil, such as blasting, undermining with a stream of water, and causing natural banks to cave, before the water under pressure was applied. It was a part of the process and a material aid to rapid and efficient work. It cannot plausibly be maintained that when the "little giants" and "monitors" were directed against the mass of material thus torn from the hill by blasting or caving, the miner was not engaged in "hydraulicking," and yet his efforts were not immediately directed against a *natural* bank.

The use of the term "natural bank" in the definitions given must be considered in connection with the context. We think the fair deduction from all the definitions is this: The essential feature which distinguishes hydraulic mining from other classes of mining is the substitution of the power of water, under pressure, applied through a nozzle, for manual labor, in moving the material into the sluices, whence, if not impounded, it is carried into the running streams. Whether this application is made against a bank in its natural state or against one artificially created is, in our judgment, immaterial.

If a miner turns his monitor against a mass of impounded earth, rocks, and tailings, brought down by the streams from a higher operator, would anyone familiar with "mining by the hydraulic process" say that he was not "hydraulicking"? If he was not "hydraulicking," how would his method of operating be characterized in the mining vernacular?

Whether or not a miner conducting mining operations within the district defined by the congressional act is within the purview of the act, and subject to the jurisdiction of the commission, will depend not upon the fact that he is or is not contributing to injuries to the navigable streams, but the inquiry is simply, "Is he utilizing water under pressure, through a nozzle, directed against a bank or mass of earth for the purpose of extracting gold therefrom?" Whether the bank or mass was brought to its present abiding-place by the carrying power of water during remote geological ages or is the result of the recent utilization of such carrying power by human agency operating on a higher level is, in our judgment, of no legal significance. It is fair to assume that the future of the great industry of hydraulic mining in California rests in a liberal administration and interpretation of the existing law, or some law framed upon the same general lines. Insistence upon narrow rules of interpretation, which do violence to the spirit of the law, will impede rather than advance the interests of the industry.

**§ 853. Judicial interpretation of the act—Its constitutionality.**—We are aware of only one instance where the act in question was directly assailed in judicial proceedings, and that was in a case involving peculiar individual hardship, if we assume the facts to have existed as alleged, which for the purposes of the case the court accepted as true. We refer to the case of United States v. North Bloomfield Mining Company, decided by Judge Ross of the ninth circuit.[22]

Acting upon the suggestion embodied in the opinion of the United States circuit court, in Woodruff v.

[22] 81 Fed. 243.

North Bloomfield,[23] the North Bloomfield company constructed extensive, complete and costly impounding works, which were so maintained as to "successfully, completely and permanently impound all of the mining debris resulting from its mining operations, except such light and inconsiderable portion of the debris therefrom as will not settle in water when affected by the least motion," and which light and flocculent matter was carried by the currents to the ocean, neither injuring nor threatening to injure, either by itself or in connection with debris from other mines, any of the navigable or other waters. Shortly after work behind the dam was commenced (1888), the United States filed in the circuit court its bill seeking to enjoin the company from operating its mine. The court, Circuit Judge Gilbert presiding, held that the impounding device was sufficient, that the flocculent matter carried over the dam was innocuous, "that the danger to be apprehended from the operation of the North Bloomfield mine, with its impounding reservoirs as constructed and used and intended to be used, is so remote and improbable that the court is not justified in enjoining the use of the property and thereby interdicting a valuable industry." The injunction prayed for was denied. Thus matters stood when congress passed the act creating the California debris commission.

Several years after the act was passed, the government commenced the action now referred to,[24] alleging the same state of facts as in the former bill, with the supplemental averments as to the passage of the act of March 1, 1893, and the failure of the North Bloomfield company to submit itself to the jurisdiction of the Cal-

[23] 9 Saw. 441, 544, 18 Fed. 753, 808.

[24] 81 Fed. 243.

ifornia debris commission and secure a permit for the conduct of mining operations behind its dam. The court, for the purpose of decision, assumed that the company's operations were being conducted in the same manner as when Judge Gilbert refused the injunction in the former action between the same parties. The case was submitted upon the bill and answer. The government was placed in the position of asserting that although the operations of the company at the time of the passage of the act of congress were conducted in a strictly lawful manner, and that nothing had occurred since in the conduct of such operations which injured, or tended to injure, the navigable streams, yet the act of congress, *ex proprio vigore,* made such operations unlawful, and compelled the North Bloomfield company to submit itself to the jurisdiction of the debris commission, or cease its operations.

This view was sustained by Judge Ross, who ordered an injunction to issue, announcing the following conclusions as to the scope and constitutionality of the act:—

(1) Until the debris commission appointed under the act should find that such mining can be carried on without causing the prohibited injury, *all* hydraulic mining within the territory drained by the Sacramento and the San Joaquin river systems is unlawful;

(2) The fact that prior to the passage of the act the United States had filed a bill to restrain the North Bloomfield company from carrying on hydraulic mining, and that a decree had been entered adjudging that impounding works erected by the company were sufficient to remove all injurious matter, and that the company could not be restrained under the then existing law, constituted no defense;

(3) That congress has absolute power, in the interest of interstate and foreign commerce, over the navigable waters of the United States, and may declare what may or may not constitute obstructions thereto. The act is therefore constitutional.

The case was carried to the circuit court of appeals, with the result that Judge Ross' decision was affirmed.[25]

We are aware of only two other cases in which the act in question has been the subject of judicial interpretation.

In County of Sutter v. Johnson et al.,[26] which was a case in the California superior court for Sutter county, it was claimed by the plaintiff that the hydraulic mining operations of the defendants were inflicting damage to the plaintiff's property, and an injunction was sought. One of the defenses interposed in the answer and set up in bar to the maintenance of the action was a permit regularly issued by the debris commission, authorizing the defendants to carry on the business complained of. In support of this defense it was urged that such permit was a conclusive adjudication by competent authority that the defendants' operations were not a nuisance. The trial judge, E. A. Davis, after pointing out that congress had only asserted its authority for the protection of the navigability of the streams, says:—

> Prior to the passage of said congressional act, the superior courts had the sole original jurisdiction of actions of the nature of this. Actions between the miners and the valley people affected by the results of hydraulic mining, brought to determine the precise issues presented in this, had become in a

[25] North Bloomfield G. M. Co. v. United States, 88 Fed. 664.

[26] Unreported, decided March 20, 1902.

> sense historic, and the law determinative of such issues was finally settled. It was determined that hydraulic mining, conducted in such a way as to cause injury to the property of another from the flow of mining debris was a nuisance and should be enjoined. If the judgment of this special commission be a bar to the present action, as claimed, then two important results must follow. First, this court has been ousted of a portion of its jurisdiction; and, secondly, the plaintiff has been deprived of one of its most important legal rights. Had congress the power to invest said commission with any judicial functions that would subtract in the least from the jurisdiction and powers of this court? Has it the power to legislate at all concerning the private property rights of the citizens of this state, or to determine through its special commission, or otherwise, what will or will not constitute a public or private nuisance within its territory? I think it clear that it cannot.

It was accordingly held that a duly issued permit from the debris commission leaves the hydraulic miner still subject to the ordinary duty to refrain from injuring the property of others, for the prevention of which injury the remedy of injunction may still be invoked.

This view of the scope and effect of the act was upheld by the supreme court of the state of California in the subsequent case of County of Sutter v. Nichols,[27] which arose in the same county, practically upon the same state of facts as the Johnson case, *supra*, and which was decided by the same trial judge in conformity with the conclusions reached in that case. In the course of its opinion, the appellate tribunal, in refuting the contention that the permit of the debris commission was in legal effect a full license to carry on

[27] 152 Cal. 688, 93 Pac. 872, 875, 15 L. R. A., N. S., 616, 14 Ann. Cas. 900.

hydraulic mining operations, irrespective of their injurious effect upon river channels or private property, and exempted the miner from liability therefor, summed up its conclusion as to the scope of the act in the following language:—

> We are of opinion that, while it was the purpose of the act in question to prevent such injuries, if possible, it was not intended to exonerate the miner from liability therefor, or in any respect to limit or restrict the powers of the state courts to protect private property from threatened injury and to redress inflicted injury thereto, from the operation of hydraulic mines, though carried on under a permit and in strict compliance with the plans and directions of the commission, and that the act does not have that effect. The provisions of the act directing notice to be given, and authorizing a hearing at which all parties interested may appear, were not intended to conclude and estop the owners of lands below with respect to subsequent injuries that might be inflicted, but were designed to enable the commission to obtain all aid which it could derive from the suggestions of all interested persons, including those who might believe their property to be in danger, in order that it might be advised as to the means and plans necessary to prevent injury.

# TITLE X.

## MINES AND MINING CLAIMS AS SUBJECTS OF CONTRACT BETWEEN INDIVIDUALS.

CHAPTER

I. MISCELLANEOUS CONTRACTS RELATING TO MINING VENTURES AND THEIR DISTINGUISHING FEATURES.

(2115)

# CHAPTER I.

## MISCELLANEOUS CONTRACTS RELATING TO MINING VENTURES AND THEIR DISTINGUISHING FEATURES.


§ 857. Introductory.
§ 858. "Grubstake" and prospecting contracts.
§ 859. Options, working bonds, or executory contracts of sale.
§ 859a. Contracts disposing of mining rights.
§ 859b. Sales of mineral in place.
§ 860. Licenses and their distinguishing attributes.
§ 861. What constitutes a lease.
§ 862. Doctrines peculiar to oil and gas leases.
§ 863. Correlative rights of adjoining owners of oil and gas wells and validity of statutory regulations concerning them.
§ 863a. Rights and remedies in reference to gas escaping from ground underlying a coal mine.


**§ 857. Introductory.** — We have frequently announced that the scope of this work is limited generally to a discussion of the federal mining system. While some space has been devoted to cognate subjects, such as tenancies in common, mining partnerships, lateral and subjacent support, and the pollution of streams in the conduct of mining operations, it will be observed that these matters bear a direct relation to some of the phases of the federal system, or are subjects of peculiar interest in that section of the United States where mining tenures are based on congressional laws. When we approach the subject of contractual relations, it must be apparent that any attempt to deal with it in detail would not only destroy the unity of the treatise, but would render the author liable to the criticism of attempting to expand the work unreasonably and for no laudable purpose. The law of contracts is a special subject in itself, too vast, even in its outlines, to warrant treatment in a collateral way. The general principles governing con-

tractual relations, where realty is the subject dealt with, the interpretation of written instruments and the manner of their execution, apply with equal force to contracts the subject matter of which is mines.

The attempt to discuss conveyances, mortgages or leases of mines, involving as it does the laws and tenures peculiar to each state of the Union, would result in the collection of a vast multitude of incongruous cases, most of which involve the interpretation of individual instruments, and but few of which enunciate any rule of universal application.

English authors include these subjects in their treatises; but England is not a federation of states, and the law in one part of it is the law in the other. There is no division of legislative authority. The contrast between that country and the United States in this respect is too marked to require extended elaboration.

Take the subject of leases. In order to make this work useful in all the states, and to give the subject any extended treatment, we should be compelled to examine the nature of the land tenures of every state in the Union, note the difference in the statutory law, and analyze by states the overwhelming mass of case law found in the numerous state reports. Subjects of this character must necessarily be left to the legal encyclopedias, to the digests, or to the works of authors dealing specially with the several branches of the law involved. The utmost that can be expected of us is to briefly discuss some classes of contracts affecting mining properties, whose distinguishing features are governed or controlled by the peculiar attributes of the subject matter involved. Beyond this we are not permitted to go.

In strict observance of these limitations we direct attention to (*a*) certain contracts looking to the acqui-

sition of mines or interests therein such as "grubstake" and prospecting contracts, options, working bonds, and executory contracts of sale, and (*b*) contracts looking to the disposal in whole or in part of the right to carry on mining operations such as sales of mineral in place, licenses, and leases.

**§ 858. "Grubstake" and prospecting contracts.**— The early miner, in the construction of his vocabulary, did not always display a regard for euphony or the proprieties of language. He coined his terms inartistically, but avoided indirection and the suggestion of latent ambiguity. When he was called upon to characterize the relationship existing between those who furnished him with money and supplies to enable him to seek and discover mines, agreeing in return that those supplying him should share in his successes, he called the transaction "grubstaking." Hence the term "grubstake" contract. This class of contracts is common in the mining regions of the west. They are not required to be in writing, as they are not within the statute of frauds.[1] They have sometimes been called "prospecting partnerships,"[2] and are said to partake of the character of "qualified partnerships."[3] Yet,

[1] Moritz v. Lavalle, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, 804, 16 Morr. Min. Rep. 236; Gore v. McBrayer, 18 Cal. 582, 588, 1 Morr. Min. Rep. 645; Meylette v. Brennan, 20 Colo. 242, 38 Pac. 75. See, also, Hirbour v. Reeding, 3 Mont. 15; Raymond v. Johnson, 17 Wash. 232, 61 Am. St. Rep. 809, 49 Pac. 492, 493; Murley v. Ennis, 2 Colo. 300, 12 Morr. Min. Rep. 360; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95, 98; Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 946, 19 Morr. Min. Rep. 566; Morrow v. Matthew, 10 Idaho, 423, 79 Pac. 196, 201; Mack v. Mack, 39 Wash. 190, 81 Pac. 707, 710. See, also, Cascaden v. Dunbar, 157 Fed. 62, 84 C. C. A. 466; Hendricks v. Morgan, 167 Fed. 106, 109, 92 C. C. A. 558. See, also, Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195, 199.

[2] Boucher v. Mulverhill, 1 Mont. 306, 12 Morr. Min. Rep. 350.

[3] Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802, 804.

unless the agreement goes beyond the mere furnishing of supplies in consideration of a participation in the discoveries, the word "partnership" is improperly used, and is misleading.[4] It is simply a common venture, wherein one, called the outfitter, supplies the "grub," and the other, called the prospector, performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement.[5]

The prospector has the right to insist on the outfitter performing his part of the agreement as a condition precedent to participation in such discoveries. Should he fail to do so, the prospector may discover and locate for his own advantage, free from any obligation to the outfitter.[6]

On the other hand, where the outfitter fulfills his part of the agreement, when the prospector finds and locates a mine, the relationship of tenancy in common as to such mine immediately arises,[7] with its attendant rights and obligations.[8]

Should the prospector during the life of the contract locate in his own name to the exclusion of the one supplying the capital, the title thus accruing to him would be held in trust for his associate in the joint venture to the extent of his interest,[9] not necessarily on the theory

[4] Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195, 199; Hendricks v. Morgan, 167 Fed. 106, 109, 92 C. C. A. 558; Hardin v. Hardin, 26 S. D. 601, 129 N. W. 108, 111.

[5] Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802, 804; Meylette v. Brennan, 20 Colo. 242, 38 Pac. 75; Northern Commercial Co. v. Lindblom, 162 Fed. 250, 252, 89 C. C. A. 230.

[6] Murley v. Ennis, 2 Colo. 300, 12 Morr. Min. Rep. 360.

[7] Miller v. Butterfield, 79 Cal. 62, 21 Pac. 543.

[8] *Ante*, § 788.

[9] Meylette v. Brennan, 20 Colo. 242, 38 Pac. 75; Byrne v. Knight, 12 Cal. App. 56, 106 Pac. 593, 594.

of partnership, but for the reason that his advances contributed to the acquisition of the property.[10]

It is essential to a right in property under a grubstake contract that such property be acquired by means of the grubstake furnished and pursuant to such contract.[11]

An agreement by a prospector to convey an undivided interest in claims already located in consideration of expenses of development to be supplied by another is neither a grubstake contract nor a partnership. It creates simply a tenancy in common.[12]

While there is no element of trust existing between tenants in common of mining property who are partners only for the purpose of exploration,[13] in cases of "grubstake" or prospecting contracts, where discoveries are made, the prospector may take no unfair advantage of his associate in dealing with the property. If he does, he will be held to account for the profits derived from his unfair practices. Every principle of equity on which are sustained resulting trusts is applicable to such a case.[14] During the life of the contract, either party may, of course, purchase mining claims from his own funds and at his own risk, without enabling the other to participate in the purchase.[15]

The "grubstake" contract, properly speaking, applies to the search for and location of mines on the public domain.

There is a distinction between a "grubstake" contract and a contract where a miner is employed on

[10] Lockhardt v. Leeds, 195 U. S. 427, 25 Sup. Ct. Rep. 76, 49 L. ed. 263.

[11] Prince v. Lamb, 128 Cal. 120, 60 Pac. 689, 691.

[12] Roberts v. Date, 123 Fed. 238, 243, 59 C. C. A. 242.

[13] *Ante*, § 800.

[14] Hendricks v. Morgan, 167 Fed. 106, 109, 92 C. C. A. 558.

[15] Miller v. Butterfield, 79 Cal. 62, 21 Pac. 543.

wages to obtain a paying mine, with a contingent increase of wages and an interest in the property if the venture should prove successful. The latter is nothing more than a contract of hiring.[16]

We frequently encounter cases where the object of the venture is not only to search for and discover mines, but also to work and develop them and conduct a general mining business. This is something more than a "grubstake" contract. Such an agreement constitutes a partnership.[17]

We find in the reports frequent mention of this class of partnerships, formed in the eastern states where expeditions were fitted out to prospect for gold in California, the articles of agreement being at times quite comprehensive and elaborate. The contracts thus formed had all the attributes of the partnership, and differed materially from the ordinary "grubstake" contract.[18]

The line of demarcation between the ordinary "grubstake" contract and a partnership is sometimes

[16] Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802, 803. See Stuart v. Adams, 89 Cal. 367, 26 Pac. 970, 971.

[17] Abbott v. Smith, 3 Colo. App. 264, 32 Pac. 843, 845; Harris v. Hillegass, 54 Cal. 463, 468; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677, 678, 15 Morr. Min. Rep. 624; Lawrence v. Robinson, 4 Colo. 567, 12 Morr. Min. Rep. 387; Costello v. Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222. See Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195, 197.

[18] Scott v. Clark, 1 Ohio St. 382, 12 Morr. Min. Rep. 276. See, also, Hoyt v. Smith, 23 Conn. 177, 60 Am. Dec. 632, 12 Morr. Min. Rep. 306, 27 Conn. 63, 12 Morr. Min. Rep. 315, where the prospector was to proceed to California and "commence digging for gold," the product to be equally divided among all contributing to the venture; Staples v. Wheeler, 38 Me. 372, where certain parties agreed to proceed with all possible dispatch to the gold diggings in California, there to labor with all diligence and fidelity to get gold in any honest manner for the space of one year from their arrival there, "the proceeds of said labor, whether in digging gold, laboring, or speculating," to be divided among all the parties equally.

difficult to determine. Generally, it may be said that if the agreement extends beyond the discovery and location, and contains a stipulation for exploiting and developing, a mining partnership arises when actual work commences.[19]

In the absence of such agreement, neither party is called upon to join the other in the work of development. They are at liberty to remain as tenants in common, neither party having the right to bind the interest of the other.[20]

For the purpose of establishing a "grubstake" agreement, the rule which has been adopted and followed by the courts of equity, requiring a plaintiff who seeks to establish a trust in real property contrary to the express terms of a deed which vests title in another to make out his case "clearly and satisfactory beyond a reasonable doubt," does not find the same reason for its application in a case where a party to a "grubstake" agreement invokes the aid of a court of equity in establishing a trust in a mining claim located on the public domain by one of the parties to such an agreement.

The courts will not refuse to enforce a "grubstake" agreement simply because a complainant cannot produce that great preponderance of evidence which produces a moral certainty and precludes all reasonable doubt.[21]

**§ 859. Options, working bonds, or executory contracts of sale.**—There is no class of contracts connected with the mining industry more familiar to the profession than that of options to purchase, working

[19] *Ante*, § 797.

[20] *Ante*, § 790.

[21] Morrow v. Matthew, 10 Idaho, 423, 79 Pac. 196, 201.

bonds, or executory contracts of sale. Unlike other classes of real estate, the value of a mine cannot be determined by mere superficial observation. Expensive investigations, involving measurements, examination of underground geological conditions, and sampling invariably precede the consummation of a purchase or sale of mining property. In order to justify an intending purchaser in making the requisite investigations and incurring the attendant expense, he invariably exacts some contract from the owner by which he secures the first privilege of purchasing the property in the event the examination proves satisfactory. In addition to this, a large army of "promoters," recruited from the ranks of all professions, trades, and occupations, swarm through the mining regions, seeking exclusive privileges and "options" on mining properties of all classes for the purpose of marketing them in the moneyed centers of the world. These conditions have given rise to a class of contracts infinite in variety, from a mere letter signed by the owner, agreeing to accept a certain price for his mine if paid within a certain time, to a formidable working bond, which contemplates entry into possession and extensive exploitation to prove the value of the mine before the privilege of purchase must be exercised. The ultimate object of all of them, however, is to secure the exclusive privilege of purchasing at a given price, within a specified time. Such contracts must be in writing, and in the main are governed by the same rules of law applicable to executory contracts for the sale of ordinary real estate. It is not our purpose to deal with these general rules, nor with the local laws which prescribe the formalities by which instruments affecting real estate must be executed; there are a few principles, however, whose application to this class of

contracts should be particularly noted, on account of the peculiar character of the subject matter.

It may be accepted as a general rule that time is not of the essence of ordinary contracts for the purchase of real estate, unless expressly so declared by the parties. An exception to this rule is well recognized where the character of the property renders it liable to fluctuations in value.

The authorities, both in England[22] and America,[23] recognize that where mines or mining properties are the subject of the contract, time is of the essence, independent of any express stipulation inserted in the instrument.[24]

The rule is thus enunciated by the supreme court of the United States:—

> In Taylor v. Longworth[25] the principle was recognized that time may become of the essence of a contract for the sale of property, not only by the express stipulation of the parties, but from the very nature of the property itself. This principle is peculiarly applicable where the property is of such character that it will likely undergo sudden, frequent, or great fluctuations in value. In respect to mineral property, it has been said that it requires, and of all properties perhaps the most, the parties interested in it to be vigilant and active in asserting their rights.[26]

[22] Pomeroy on Contracts, §§ 384, 385, note 4.

[23] Id., §§ 383, 384.

[24] Settle v. Winters, 2 Idaho, 199, 10 Pac. 216, 221; Durant v. Comegys, 2 Idaho, 936, 28 Pac. 425, 428; Skookum Oil Co. v. Thomas, 10 Cal. App. Dec., No. 516, p. 858; Harper v. Independence Dev. Co., 13 Ariz. 176, 108 Pac. 701, 704.

[25] 14 Pet. (U. S.) 172, 174, 10 L. ed. 405.

[26] Waterman v. Banks, 144 U. S. 394, 403, 12 Sup. Ct. Rep. 646, 36 L. ed. 479 (citing Prendergast v. Turton, 1 Younge & C. Ch. 110; Doloret v. Rothschild, 1 Sim. & S. 590, 598; Fry's Specific Performance, §§ 714, 715; Pomeroy on Contracts, §§ 384, 385; Brown v. Covil-

As is said by Fry in his work on Specific Performance:[27]—

> The nature of all mining transactions is such as to render time essential, for no science, foresight, or examination can afford a sure guaranty against sudden loss, disappointment, and reverses, and a person claiming an interest in such an undertaking ought, therefore, to show himself in good time willing to partake of the possible loss as well as profit.[28]

Time is usually regarded as the essence of the contract when the character of the property renders it liable to fluctuations, and this is especially true of mining property.[29]

The necessity for a strict adherence to the rule that in all contracts for the purchase of mines time is of the essence is apparent. Were the rule to be relaxed and the owner of the mine executing the option or contract of sale, which is ordinarily unilateral and not mutual, to be compelled to resort to the courts to terminate the equities of the proposed vendee, or remain in a state of uncertainty, awaiting the lapse of an indefinite period called "reasonable time," his property would remain practically unmarketable. The holder of the option would be given unreasonable opportunities to speculate, without the fear of incurring any loss. The law would place him in a position to interdict a sale

laud, 6 Cal. 566, 572; Green v. Covillaud, 10 Cal. 317, 324, 70 Am. Dec. 725).

[27] § 716.

[28] See, also, Waterman on Specific Performance, § 460.

[29] Williams v. Long, 139 Cal. 186, 72 Pac. 911, 912; Clark v. American M. & D. Co., 28 Mont. 468, 72 Pac. 978, 981; McKenzie v. Murphy, 31 Colo. 274, 72 Pac. 1075, 1076; Merk v. Bowery Min. Co., 31 Mont. 298, 78 Pac. 519, 524; Green Ridge Fuel Co. v. Littlejohn, 141 Iowa, 221, 119 N. W. 698, 700; Gaines v. Chew, 167 Fed. 630, 638, and cases cited; Snider v. Yarbrough, 43 Mont. 203, 115 Pac. 411, 412.

to anyone else, or to exact an unearned consideration for a surrender of phantom equities.[30]

On the other hand, the rule that contracts which do not involve mutuality cannot be specifically enforced is modified in favor of the holder of this class of contracts. He is afforded this equitable remedy, where he fully and fairly performs, or offers to perform, the terms of his contract within the time stipulated.

> The very purpose of an optional contract of this nature is to extinguish this mutuality of right and vest in one of the parties the privilege of determining whether the contract shall be vitalized and enforced. An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value.[31]

**§ 859a. Contracts disposing of mining rights.**— Where one holding the entire title in himself to mineral in the earth makes a contract conferring upon another a right to enter and take mineral from the premises, the exact scope and effect of such contract is often a matter of much importance to the respective parties, for if it be a mere license the grantor may still have a concurrent right to mine which he may in turn grant to another,[32] or the original grant may be in such form that it is capable of being revoked at any time by the grantor. On the other hand, it may confer an exclusive right upon the grantee either for a fixed or uncertain period, and yet fall short of a grant of an

30 McKenzie v. Murphy, 31 Colo. 274, 72 Pac. 1075, 1076.

31 Watts v. Kellar, 56 Fed. 1, 4, quoted in note to § 169, Pomeroy on Contracts, where will be found a large collection of authorities in support of this doctrine; Zelleken v. Lynch, 80 Kan. 746, 104 Pac. 563, 564.

32 Woodside v. Ciceroni, 93 Fed. 1, 5.

estate in land.[33] It is often difficult in a given instance to find a technically correct legal name for the contract employed, for it may possess some of the characteristics of two or more well-defined classes.[34] What is more important, however, from a practical standpoint, is to ascertain from the contract what are the respective rights of the contracting parties.

Again, it often occurs that by reason of the termination by death or otherwise of the estate or interest of the grantor or grantee, it becomes necessary to measure the scope and ascertain the effect of the instrument in order to fix the rights of successors in interest. While we cannot, as already indicated, undertake an exhaustive discussion of the nature and effect of different contracts carrying mining privileges, we may without impropriety point out some of the characteristic features and legal effects of such contracts.

**§ 859b. Sales of mineral in place.**—Mineral in place is land.[35] An estate in such mineral may exist as an entity, entirely distinct from the overlying surface. Where there are several seams or veins of mineral lying within and under the same surface, it is quite possible for each to be the subject of separate ownership and separate grant.[36]

These propositions apply in their entire effect to the solid minerals like coal, lead, iron, etc. In regard to the fluid substances, such as petroleum and natural gas, they require considerable modification and quali-

[33] Funk v. Haldeman, 53 Pa. 229, 7 Morr. Min. Rep. 203; Union P. Co. v. Bliven P. Co., 72 Pa. 173.

[34] Emery Co. v. Lucas, 112 Mass. 424; Woodside v. Ciceroni, 93 Fed. 1, 5.

[35] Halla v. Rogers, 176 Fed. 709, 712.

[36] Emery Co. v. Lucas, 112 Mass. 424; Hartwell v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448, 3 Morr. Min. Rep. 229; *ante*, § 812.

fication, growing out of their fugitive nature, a subject we shall discuss more at length hereafter.[37]

The removal of mineral substances from the land is an act which constitutes *pro tanto* a permanent destruction of the substance of the real estate. It is a use of an estate which, unlike the use of a house or a farm, consumes the thing used. It no longer exists. It is obvious, therefore, that when one grants to another the right to thus exhaust the substance of a mineral estate, the exercise of the right, so far as it goes, works upon the estate the same result, irrespective of the form of the instrument conferring such right. Where such instrument is in the form of an absolute conveyance of the mineral estate, little need be said. It becomes a simple case of a grant of real property by deed, requiring the usual formalities incident to such grant, and the instrument itself will be construed in the same manner as ordinary conveyances of real property.[38]

Where the instrument is not in the form of an absolute conveyance, but where the language employed is sufficient to pass the entire estate in the mineral to the grantee, it often operates as a sale of real estate, although it purports upon its face to have a different scope and purpose. It will be more convenient to consider this class of contracts under the head of mining leases.[39]

**§ 860. Licenses and their distinguishing attributes.** A license is an authority to go upon the land of the

[37] See *post*, § 862.

[38] Hartwell v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448, 3 Morr. Min. Rep. 229; Edwards v. McClurg, 39 Ohio St. 41.

[39] *Post*, § 861.

licensor to do an act or series of acts there, but passes no estate or interest in the land.[40]

It is technically an authority to do something on the land of another without passing an estate in the land.[41]

Bainbridge says that the distinction between lease and license is, that the former is a distinct conveyance of an actual interest or estate in the lands, while the latter confers a mere incorporeal right, to be exercised in the lands of others. It is a *profit a prendre,* and, unlike an easement, may be held apart from the possession of land.[42]

> There is a broad distinction [said the supreme court of California] between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property, and his possession, like that of an individual under contract with the owner of land to cut timber or harvest a crop of potatoes for a share of the proceeds, is the possession of the owner.[43]

[40] East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248, 9 Morr. Min. Rep. 332; Clute v. Carr, 20 Wis. 531, 91 Am. Dec. 442; Mumford v. Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202, 9 Morr. Min. Rep. 219; Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439.

[41] Cook v. Stearns, 11 Mass. 534; Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484, 6 Morr. Min. Rep. 216; Massot v. Moses, 3 S. C. 168, 16 Am. Rep. 697, 8 Morr. Min. Rep. 607.

[42] Bainbridge, 4th ed., p. 510. See, also, MacSwinney on Mines, p. 249; Halla v. Rogers, 176 Fed. 709, 714.

[43] Wheeler v. West, 71 Cal. 126, 11 Pac. 871, 873 (citing Funk v. Haldeman, 53 Pa. 229, 7 Morr. Min. Rep. 203; Gillett v. Treganza, 6 Wis. 343; Grubb v. Bayard, 2 Wall. Jr. 81, Fed. Cas. No. 5849, 9 Morr. Min. Rep. 199; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760, 3 Morr. Min. Rep. 238; Potter v. Mercer, 53 Cal. 667, 673; Shaw v. Cardwell,

It amounts to nothing more than an excuse for an act which would otherwise be a trespass.[44]

In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land in respect to which he might bring ejectment.[45]

A license is personal, and not capable of being assigned or transferred by the person to whom it is granted.[46]

A transfer by the licensee operates as a forfeiture,[47] unless it be coupled with an interest[48] which may be created by the instrument itself (when it is something more than a license), or grows out of expenditures made pursuant to its requirements.[49]

A mere grant of a right to take ore, no estate or interest in the land being granted, is a license only, and is not exclusive of the licensor, unless the expressed intention of the parties is otherwise, or the implication is so clear and strong as to be unavoidable.[50]

A license is revocable, and its continuance depends upon the will of the grantor.[51]

16 Cal. App. 1, 115 Pac. 941, 943, 1 Water & Min. Cas. 558; Clark v. Wall, 32 Mont. 219, 79 Pac. 1052, 1053.

[44] Cook v. Stearns, 11 Mass. 534.

[45] Bainbridge, 4th ed., p. 510; Doe ex dem. Hanley v. Wood, 2 Barn. & Ad. 182.

[46] Harris v. Gillingham, 6 N. H. 11, 23 Am. Dec. 701; Hill v. Cutting, 113 Mass. 107; Jackson v. Babcock, 4 Johns. (N. Y.) 418.

[47] Dark v. Johnson, 55 Pa. 164, 93 Am. Dec. 732, 9 Morr. Min. Rep. 283.

[48] Watson v. King, 4 Camp. 272; Ganssen v. Morton, 10 Barn. & C. 731; Thompson v. McElarney, 82 Pa. 174; Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 60.

[49] Silsby v. Trotter, 29 N. J. Eq. 228, 3 Morr. Min. Rep. 137; Muskett v. Hill, 5 Bing. N. C. 694.

[50] Silsby v. Trotter, 29 N. J. Eq. 228, 3 Morr. Min. Rep. 137.

[51] Bartlett v. Prescott, 41 N. H. 493; Desloge v. Pearce, 38 Mo. 588,

Unless it is coupled with such an interest, or the privilege is conferred in such a manner as to work an estoppel against the grantor,[52] it is none the less revocable because a consideration has been paid for it.[53]

It is terminated at the death of the party conferring it,[54] and a conveyance of the land revokes it.[55]

A license cannot be revoked, however, so as to make an entry under it or acts done under it trespasses;[56] but if the licensee continues work after revocation, he becomes a trespasser.[57]

A license is presumed to continue until revoked.[58]

Where parties have entered upon the enjoyment of the privileges granted by a license, upon its revocation the licensee is entitled to be compensated for his money and labor expended.[59]

9 Morr. Min. Rep. 247; Shaw v. Cardwell, 16 Cal. App. 1, 115 Pac. 941, 943, 1 Water & Min. Cas. 558.

52 Muskett v. Hill, 5 Bing. N. C. 694; Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202, 9 Morr. Min. Rep. 219; Bracken v. Rushville, 27 Ind. 346, 3 Morr. Min. Rep. 273; Beatty v. Gregory, 17 Iowa, 109, 85 Am. Dec. 546, 9 Morr. Min. Rep. 234; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203, 9 Morr. Min. Rep. 268; Gillett v. Treganza, 6 Wis. 343; Wheeler v. West, 71 Cal. 126, 11 Pac. 871, 873; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248, 3 Morr. Min. Rep. 332; Funk v. Haldeman, 53 Pa. 229, 7 Morr. Min. Rep. 203.

53 Shaw v. Cardwell, 16 Cal. App. 1, 115 Pac. 941, 943, 1 Water & Min. Cas. 558; Wood v. Leadbetter, 13 Mees. & W. 838; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203, 9 Morr. Min. Rep. 268; Dark v. Johnson, 55 Pa. 164, 93 Am. Dec. 732, 9 Morr. Min. Rep. 283.

54 Carter v. Page, 4 Ired. 424; De Haro v. United States, 5 Wall. 599, 627, 18 L. ed. 681.

55 Hays v. Richardson, 1 Gill & J. (Md.) 366; Vollmer's Appeal, 61 Pa. 118; Cobb v. Fisher, 121 Mass. 160; Shaw v. Caldwell, 16 Cal. App. 1, 115 Pac. 941, 943, 1 Water & Min. Cas. 558.

56 Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484, 6 Morr. Min. Rep. 216.

57 Lockwood v. Lunsford, 56 Mo. 68; Lunsford v. La Motte Lead Co., 54 Mo. 426, 7 Morr. Min. Rep. 532.

58 Keeler v. Green, 21 N. J. Eq. 27, 12 Morr. Min. Rep. 465.

59 Beatty v. Gregory, 17 Iowa, 109, 85 Am. Dec. 546, 9 Morr. Min. Rep. 234; Harkness v. Burton, 39 Iowa, 101, 9 Morr. Min. Rep. 318; Bush v. Sullivan, 3 G. Greene (Iowa), 344, 54 Am. Dec. 506.

Whether an instrument is a license or a lease will depend not upon what designation the parties give to it, but upon the manifest intent gleaned from a consideration of its entire contents.[60]

A license may be given by parol,[61] and when possession is taken under it, it is such a part performance as takes it out of the statute of frauds.[62]

In the practical mining world, mere licenses are not looked upon at this day as affording to the operator that degree of security which the investment of capital for development purposes requires. It is safe to assume that where enterprises of any magnitude are contemplated, the parties will, for mutual protection, require formal instruments of broader scope than those granting mere licenses.

**§ 861. What constitutes a lease.**—The line of demarcation between a license coupled with an interest and a lease, and between a lease and an absolute grant of the minerals with possessory privileges, is not clearly defined. There is considerable confusion in the adjudicated cases, rendering it difficult to draw any accurate or generally accepted conclusion.

For example: In Ohio an instrument which grants and demises unto the lessee all the oil and gas under a tract of land, also the land for a definite term of years for the purpose, and the exclusive right, of operating thereon for oil and gas, and the *habendum* clause of which provides: "To have and to hold the same for said term and as much longer as oil and gas is pro-

[60] Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 860, 60 Pac. 983, 47 L. R. A. 540.

[61] Gesner v. Cairns, 2 Allen N. B. 595; Desloge v. Pearce, 38 Mo. 588, 9 Morr. Min. Rep. 247; Wheeler v. West, 71 Cal. 126, 11 Pac. 871, 873.

[62] Anderson v. Simpson, 21 Iowa, 399, 9 Morr. Min. Rep. 262.

duced or the rental paid thereon," would be considered as a lease, while, in Pennsylvania and West Virginia it would be construed as a mere license until discovery of oil.[63]

If certain considerations, however, are borne in mind, this confusion is found to be more apparent than real. Where the grantor is the absolute owner of land containing mineral, and so long as both grantor and grantee remain alive and *sui juris,* questions which come up under instruments conferring mining rights often call for adjudication only to the extent of ascertaining the respective rights of the parties to the contract. As already pointed out, the practically important question is what are these rights, rather than what is the proper name for the instrument. A given instrument, for instance, may very properly be held a lease as between grantor and grantee; that is to say, such conclusion may be perfectly correct so far as it is necessary to determine in the matter before the court; on the other hand, the very same instrument may come before the court upon a question of taxation or inheritance and it will be found to be a sale of real estate and not a lease. We must therefore always keep in mind what is the question before the court, and we will find that most of the decisions are from such standpoint harmonious.

In a given tract of land it is always a matter of doubt to what extent, if any, mineral may exist in paying quantities, until very considerable development work has been performed, which requires in most instances large expenditure of capital. For this and other reasons not profitable to discuss here, a custom long ago arose for the owner of supposed mineral land to grant to a mine operator the right to enter upon the land

63 Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 S. E. 836, 840.

and search for and extract mineral, and the form which the contracting parties pretty generally adopted to express their agreement was a "lease," which purported to entitle the "lessee" to occupy such part of the premises as was necessary to carry on his mining operations, and to "use" the mine and extract the minerals therefrom. In return for these privileges or rights, the so-called "lessor" usually reserved "rent" in the form of a certain sum per ton on all mineral to be produced. This form of contract seemed best adapted to the mutual protection of the parties, in view of the uncertainty of the extent and value of the mineral, and was without doubt considered by them in fact as in name a "lease."

Now, a lease has been defined to be,—

> A contract for the possession and profits of lands and tenements on the one side and a recompense of rent or other income on the other; or it is a conveyance to a person for life or years or at will, in consideration of a return of rent or other recompense.[64]

By the term "rent" we mean:—

> A return or compensation for the possession of some corporeal inheritance,—a certain profit, either in money, provisions, or labor, issuing out of lands and tenements in return for their use.[65]

We have already seen[66] that mineral in place is land; that when it is taken therefrom and changed into personal property, real estate has to that extent been destroyed. It is obvious that the normal relation of landlord and tenant does not contemplate destruction of the estate by the tenant, and that such destruction

[64] Jackson ex dem. Webber v. Harsen, 7 Cow. (N. Y.) 323, 326, 17 Am. Dec. 517.

[65] 2 Bouvier's Law Dictionary.

[66] §§ 812, 859b, *ante*.

cannot properly be called "use." It is equally plain that the so-called "rent" in a mining lease is something more than a return for the possession and use of real property. While the contract is in name a lease, it amounts in fact to a sale,[67] and if it grant the right to take all the mineral, it is a sale of real estate—the lessee's interest is a fee in the mineral and the lessor's so-called rent is purchase money for real estate.[68]

Such rents or royalties are principal, and not income, and must be so treated in the ascertainment of the respective interests of life tenants and remaindermen.[69]

Where, however, a testator has shown an intention that such royalties should pass as income, such intention will govern.[70] The conduct of the parties under such an instrument, showing their interpretation of it, may, of course, constitute a large factor in properly classifying it.[71]

The court of appeals of New York has held that a certain lease which came before it for adjudication did not amount to a sale of the mineral in place as land. That court made a distinction between the particular lease under consideration and those involved in the Pennsylvania cases, to the effect that it did not carry

67 Hope's Appeal (Pa.), 3 Atl. 23, 24; Gowan v. Christie, 5 Moak, 114, 8 Morr. Min. Rep. 688; Suffern v. Butler, 19 N. J. Eq. 202; Hobart v. Murray, 54 Mo. App. 249; Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937, 938.

68 Plummer v. Hillside Coal & Iron Co., 104 Fed. 208, 211, 43 C. C. A. 490; Kingsley v. Hillside Coal & Iron Co., 144 Pa. 613, 23 Atl. 250, 251; Wilmore Coal Co. v. Brown, 147 Fed. 931, 936, and cases there cited.

69 Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564, 565; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 787.

70 Eley's Appeal, 103 Pa. 300; McClintock v. Dana, 106 Pa. 386; Wentz's Appeal, 106 Pa. 301.

71 McMillan v. Titus, 222 Pa. 500, 72 Atl. 240, 241.

"the whole body of the coal, considered as of cubical dimensions, and capable of descriptive separation from the earth above and around it,—the broad words of the primary grant are indeed sufficient, within the cases cited, to carry title to the coal as land, but they are cut down, narrowed and restrained by the specific provisions which follow."[72] Without expressing an opinion upon the value of the distinction there made, we cannot refrain from commending in general the righteousness of the judgment in the case.

In Raynolds v. Hanna,[73] the Pennsylvania doctrine was distinctly repudiated, but a careful examination of the case as reported discloses the fact that the same conclusion might well have been reached consistently with the general doctrine by the application of the principles heretofore stated.[74]

The late case of Couch v. Welch[75] presents no difficulty, unless the lease there in question was of much larger scope than is indicated in the opinion of the court. It seems to have been no more than the ordinary working bond.

Although the doctrine that a grant of all the mineral in a described tract of land, whether by deed or so-called lease, conveys an estate in the mineral as land, does not seem to have been specifically passed upon as applicable to a lease of mining property acquired or held under the United States mineral acts,

[72] Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593; affirmed, 23 N. E. 1149, 19 L. R. A. 127.

[73] 55 Fed. 783, 799.

[74] *Ante*, this section; Eley's Appeal, 103 Pa. 300; McClintock v. Dana, 106 Pa. 386; Wentz's Appeal, 106 Pa. 301. Raynolds v. Hanna, 55 Fed. 783, was reversed in the circuit court of appeals (59 Fed. 923, 8 C. C. A. 370), upon other questions which disposed of the whole case without the necessity of reviewing the conclusion reached upon this point.

[75] 24 Utah, 36, 66 Pac. 600.

we are constrained to believe that when such questions arise, the general doctrine as herein set forth will be recognized and applied with all its attendant consequences. That doctrine, as we have seen, is based upon the principles that mineral in place is land, that a grant of the right to extract and dispose of it, and thus destroy its character as real estate, amounts to its sale as land, and that royalties (or so-called rent), payable *per quantum* of the mineral taken, are purchase money and principal, rather than rent and income. As these principles flow from the nature of mineral land as such, we can see no reason why they should not be of equal application to leases of mineral land acquired from any source.

As to the extent of the power of the proprietor to grant such an estate, however, there would probably be a distinction between patented and unpatented claims. In the case of a patented claim, his power would be complete. In the case of a claim held merely under location in obedience to the statutes, as the paramount title is in the government and as the locator's own interest is liable to be lost by abandonment before perfection of title, so the interest acquired under a lease from him would be subject to a like limitation and possibility of extinction. It would hardly possess the dignity of an estate in land, either in leasehold or fee, but would amount to an assignment of the locator's possessory right.[76]

As to whether an instrument is or is not a lease depends upon the intent of the parties and not upon the mere form in which it is prepared.[77]

[76] See Black v. Elkhorn Min. Co., 163 U. S. 445, 451, 16 Sup. Ct. Rep. 1101, 41 L. ed. 221, 18 Morr. Min. Rep. 375.

[77] Watson v. O'Hern, 6 Watts (Pa.), 362, 8 Morr. Min. Rep. 333; Offerman v. Starr, 2 Pa. 394, 44 Am. Dec. 211, 10 Morr. Min. Rep. 614;

The foregoing principles may be illustrated by the following brief references to cases from a number of different jurisdictions:—

It has been held in California that a contract giving the right to work a mine for a certain time, the gross product to be equally divided between the parties, is not a lease; that such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered, and is in all its essential features a contract for labor to be performed and to be paid for by a share of the profits.[78]

As in the case of "cropping contracts" in the agricultural regions, the parties become tenants in common of the products.[79]

In Gowan v. Christie[80] it was said that a mining lease is practically a sale of a portion of the land,[81] notwithstanding the instrument designates the parties as lessor and lessee.[82]

A written agreement by the owner of coal land, giving another the exclusive right to mine coal on such land for a term of years, is not a mere license, but an assignable lease.[83]

Moore v. Miller, 8 Pa. 272; Muskett v. Hill, 5 Bing. N. C. 694; Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 860, 60 Pac. 983, 47 L. R. A. 540.

78 Hudepohl v. Liberty Hill Cons. M. & W. Co., 80 Cal. 553, 558, 22 Pac. 339, 340; Stuart v. Adams, 89 Cal. 367, 26 Pac. 970, 971.

79 Hudepohl v. Liberty Hill Cons. M. & W. Co., 80 Cal. 553, 22 Pac. 339, 340, and cases cited; Bernal v. Hovious, 17 Cal. 542, 545, 79 Am. Dec. 147; Putnam v. Wise, 1 Hill (N. Y.), 234, 37 Am. Dec. 309. See note, 37 Am. Dec. 317, 323.

80 5 Moak, 114, 8 Morr. Min. Rep. 688.

81 See, also, Harlan v. Lehigh Coal Co., 35 Pa. 287, 8 Morr. Min. Rep. 496.

82 Delaware etc. R. R. Co. v. Sanderson, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394; Fairchild v. Fairchild (Pa.), 12 Atl. 74; Tilley v. Moyers, 43 Pa. 404, 4 Morr. Min. Rep. 320.

83 Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937, 938.

An agreement in writing purported, in consideration of stipulated royalties, to lease land for mining purposes only, and, subject to the limitation that the grantee's rights should not be interfered with, reserved the right of occupation for the purpose of cultivation to the grantor. It provided that it should remain in force until the mineral should be exhausted, but otherwise had no fixed term. *Held*, that the agreement was not a lease, since it had no determinate period, but that it passed title to all minerals within the land subject to the claim of the owner for royalties.[84] In agreements of this character, there is an implied covenant for diligent search and operation, and under such a contract the lessee is bound to proceed with his mining operations with reasonable diligence.[85]

**§ 862. Doctrines peculiar to oil and gas leases.**— The peculiar nature of oil and gas deposits has led to the adoption of characteristic provisions in leases and other contracts, looking to their discovery and production, and also to exceptional construction of the terms of such instruments.

These contracts differ too widely from one another to permit any attempt here to examine exhaustively the multitude of cases which have arisen. They have, it is said, given rise to a special jurisprudence.[86]

The difficulties which have beset the courts in the interpretation of this class of contracts prompted the supreme court of the state of Indiana in Ohio Oil Co. v. Detamore[87] to use the following language:—

[84] Hobart v. Murray, 54 Mo. App. 249. But see Buchanan v. Cole, 57 Mo. App. 11.

[85] McIntosh v. Robb, 4 Cal. App. 484, 88 Pac. 517; Payne v. Neuval, 155 Cal. 46, 99 Pac. 476, 479. See, also, Brewster v. Lanyon Zinc Co., 140 Fed. 801, 810, 72 C. C. A. 213.

[86] Federal Betterment Co. v. Blaes, 75 Kan. 69, 88 Pac. 555, 557.

[87] 73 N. E. 906, 908.

> Whether it proceeds from design of crafty speculators in oil and gas leases to enshroud their contracts with doubtful, ambiguous, inconsistent, and absurd provisions, as a means of promoting their interests, or whether it comes from a custom in the rural district of employing unskilled draftsmen, it is a noticeable fact that few subjects of contract contribute to the courts an equal proportion of written agreements for interpretation. The fact is so patent that courts generally, in gas and oil states, have come to place such contracts in a class of their own, and to look critically into such instruments for the real intention of the parties, because it so frequently happens that they cannot, on account of incongruous provisions, be enforced according to the strict letter of the contract.

Before reviewing some of the more prominent features, which are commonly met in such instruments, we consider it pertinent at this time to point out some of the principles specially applicable to property rights in oil and natural gas, which, because of the wandering and fugitive nature of these substances, differ considerably from those which are applicable to the title and ownership of solid minerals, and from which essential differences spring, most, if not all, the peculiar and distinguishing features of oil and gas leases, which have been pointed out by the courts in construing them.

While, in a general way, the doctrine that mineral in place is land has been applied by the courts to the construction of instruments granting, excepting or reserving the oil or gas in the land, or both, with like legal effect as in the cases of grants of solid minerals,[88]

[88] Brown v. Spilman, 155 U. S. 665, 670, 15 Sup. Ct. Rep. 245, 39 L. ed. 304; Koen v. Bartlett, 41 W. Va. 559, 56 Am. St. Rep. 884, 23 S. E. 664, 665, 31 L. R. A. 128; Stoughton's Appeal, 88 Pa. 198; Blakeley v. Marshall, 174 Pa. 425, 34 Atl. 564, 565, 18 Morr. Min. Rep. 350; Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995, 997, 1 Ann. Cas. 403;

yet, they only form a part of the land, and belong to the owner of the surface, or his grantee, so long as they are on it, or in it, or are subject to his control. Hence, it is said in Westmoreland etc. Gas Co. v. De Witt,[89] that where oil and gas escape, the title of the former owner is gone.

In this case, the supreme court of the state of Pennsylvania, in reversing a judgment of the trial court, based upon a finding in construing the lease involved in the controversy that gas is a mineral and while *in situ* is part of the land, and that, therefore, possession of the land is possession of the gas, points out the erroneous reasoning underlying the finding in the following passage, which will be found in the examination of the oil and gas cases in the books to be the leading expression of judicial opinion on the subject. The court said:—

> The learned master says gas is a mineral, and while *in situ* is part of the land, and, therefore, possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral, but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than that of mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating, waters. Water and oil, and

Kansas Natural Gas. Co. v. Board of Commrs. of Neosho Co., 75 Kan. 335, 89 Pac. 750, 751; Mound City B. & Gas Co. v. Goodspeed G. & O. Co., 83 Kan. 136, 109 Pac. 1002, 1004; 1 Water & Min. Cas. 244; Carter v. Tyler County Court, 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 784, 39 L. R. A. 292; Osborn v. Arkansas Territorial O. & G. Co. (Ark.), 146 S. W. 122.

[89] 130 Pa. 235, 249, 18 Atl. 724, 725, 5 L. R. A. 731, 29 Am. L. Reg. 93.

still more strongly gas, may be classes by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and, unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence, within the limits of a particular tract is uncertain, as said by Chief Justice Agnew, in Brown v. Vandegrift, 80 Pa. 147, 148. They belong to the owner of the land and are part of it, so long as they are on or in it, and are subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas so that it comes into his well and under his control, it is no longer yours, but his. And equally so as between lessor and lessee in the present case, the one who controls the gas—has it in his grasp, so to speak—is the one who has possession in the legal as well as in the ordinary sense of the word.[90]

This doctrine received the approval of the supreme court of the United States;[91] except that in the later case of Ohio Oil Co. v. Indiana[92] the inadequacy of classifying oil and gas, by analogy to animals *ferae naturae*, as minerals *ferae naturae* is pointed out by showing that, while in regard to the former the public is endowed with the right, subject to regulations by the state, to reduce them to private ownership by taking them into possession, in the case of natural gas and oil, no such right exists in the public at large,

[90] Id., 18 Atl. 725.

[91] Brown v. Spilman, 155 U. S. 665, 670, 15 Sup. Ct. Rep. 245, 39 L. ed. 304.

[92] 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, 20 Morr. Min. Rep. 466.

but is vested only in the owners in fee of the surface of the earth, or their grantees or lessees, within the area of an oil or gas field.

The rule as thus qualified by the federal supreme court, it is said in Kansas Natural Gas Co. v. Haskell,[93] has been accepted in all the great oil and gas producing states, save Indiana.

In the latter state the rule is announced as follows: The owner of the fee of oil and gas bearing lands does not have an absolute ownership in the oil or gas in place in the land, but a qualified ownership only, capable, however, of being made absolute by reduction to possession.[94]

Based upon the foregoing considerations, several courts have reached the conclusion that in the strictly legal sense of the term, there can be no severance of title in oil and gas from that of the surface of the land, and that a grant thereof passes no estate which can be the subject of an action in ejectment, or any other of the so-called real actions.[95]

Coming, now, to the special consideration of oil and gas leases, it may be said that, generally speaking, such contracts are not strictly leases as defined and

[93] 172 Fed. 545, 563, and cases there cited.

[94] Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 82, 12 L. R. A. 652; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 812, 47 L. R. A. 627; Ohio Oil Co. v. Indiana, 177 U. S. 190, 208, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, 20 Morr. Min. Rep. 466. See, also, Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 1075, 48 L. R. A. 748, 20 Morr. Min. Rep. 350. As to acceptance of this doctrine in Pennsylvania, also Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53, 54.

[95] Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53, 54; Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902, 906; Frank Oil Co. v. Bellevue G. & O. Co., 29 Okl. 719, 119 Pac. 260, 261. But see Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, 144, 146, 99 Pac. 483, 486, 20 L. R. A., N. S., 211; Preston v. White, 57 W. Va. 278, 50 S. E. 236, 237.

treated in the law of landlord and tenant. They are in the nature of written licenses, with a conditional grant conveying the grantor's interest in the gas or oil well, providing that gas and oil is found in paying quantities. It is well settled that the title of the lessee is inchoate until such discovery, at which point of time he acquires a vested estate in the mineral itself.

> The title is inchoate, and for the purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.[96]

An oil or gas lease usually purports to grant to the lessee the right to go upon the land and drill for and extract oil or gas for a definite term and as long as gas or oil is produced in paying quantities. The

[96] Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, 735; Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220, 223; Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 980, 44 L. R. A. 107; Lawson v. Kirchner, 50 W. Va. 331, 40 S. E. 344, 346; Huggins v. Daley, 99 Fed. 606, 613, 40 C. C. A. 12, 48 L. R. A. 320; Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 693, 40 L. R. A. 266; Ahrns v. Chartiers Valley Gas Co., 188 Pa. 249, 41 Atl. 739, 741; Northwestern Ohio Nat. Gas Co. v. Tiffin, 59 Ohio St. 420, 54 N. E. 77, 83; Ramage v. Wilson, 45 Ind. App. 599, 88 N. E. 862, 864; Gillespie v. Fulton Oil & Gas Co., 239 Ill. 326, 88 N. E. 192, 193; Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 S. E. 836, 840; Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584, 585, 22 Morr. Min. Rep. 42; Florence Oil & Refining Co. v. Orman, 19 Colo. App. 79, 73 Pac. 628, 631; Dickey v. Coffeyville Vitrified Brick & Tile Co., 69 Kan. 106, 76 Pac. 398, 400; Kansas Nat. Gas Co. v. Board of Commrs. of Neosho Co., 75 Kan. 335, 89 Pac. 750, 751; Backer v. Penn Lubricating Co., 162 Fed. 627, 89 C. C. A. 419; Brockshire Oil Co. v. Casmalia Ranch Oil & Development Co., 156 Cal. 211, 103 Pac. 927. See, also, as to difference between oil and coal leases in this particular, Plummer v. Hillside Coal & Iron Co., 160 Pa. 483, 28 Atl. 853, 854; Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490, 492.

validity of such lease has been assailed on account of the uncertainty of the term, but it has been upheld by the courts.[97]

From the wandering nature of oil and gas deposits, the opening of a well in a given place is apt to draw these deposits from neighboring lands, and unless a sufficient number of wells is promptly drilled, the result to the land owner is the permanent loss of these valuable minerals. These facts have led the courts to construe oil and gas leases most favorably to the grantor.[98]

It may be stated that in these leases there is an implied covenant on the part of the lessee for diligent search and operation, and that where a forfeiture has accrued by the terms of the instrument, or by failure to proceed with reasonable diligence, the lease is terminated at the option of the lessor.[99]

[97] Dickey v. Coffeyville Vitrified Brick & Tile Co., 69 Kan. 106, 76 Pac. 398, and cases there cited.

[98] Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 272, 36 L. R. A. 566; Western Pennsylvania Gas Co. v. George, 161 Pa. 47, 28 Atl. 1004, 1005; Wettengele v. Gormley, 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 934, 935; Acme Oil Co. v. Williams, 140 Cal. 681, 74 Pac. 296, 297; Emery v. League, 31 Tex. Civ. App. 474, 72 S. W. 603; Powers v. Bridgeport Oil Co., 238 Ill. 397, 87 N. E. 381, 383; Superior Oil & Gas Co. v. Mehlin, 25 Okl. 809, 138 Am. St. Rep. 942, 108 Pac. 545, 548; Frank Oil Co. v. Belleview Gas & O. Co., 29 Okl. 719, 119 Pac. 260, 265.

[99] Huggins v. Daley, 99 Fed. 606, 613, 40 C. C. A. 12, 48 L. R. A. 320; Guffy v. Hukill, 34 W. Va. 49, 26 Am. St. Rep. 901, 8 L. R. A. 759, 11 S. E. 754, 755; Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 980, 44 L. R. A. 107; Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839, 850; Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178, 181, 32 C. C. A. 560; Shepard v. McCalmont, 38 Hun (N. Y.), 37; Ray v. Western Pennsylvania Nat. Gas Co., 138 Pa. 576, 21 Am. St. Rep. 922, 20 Atl. 1065, 1066, 12 L. R. A. 290; Aye v. Philadelphia Co., 193 Pa. 451, 74 Am. St. Rep. 696, 44 Atl. 555, 556; Cassell v. Crothers, 193 Pa. 359, 44 Atl. 446, 447; Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 693, 40 L. R. A. 266; Chapple v. Kansas Vitrified Brick Co., 70 Kan. 723, 79 Pac. 666, 668; Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683, 686; Howerton v.

It is not necessary that technical words should be inserted in such a lease to raise this condition. If a reasonable and fair interpretation of its terms shows that it was made to depend on doing something essential to its objects and purposes, the law implies it as a condition to that end.[100]

On account of the volatile nature of oil and gas, and the consequent loss which may ensue to the land owner, by reason of the inactivity of the lessee, courts of equity construe forfeiture clauses strictly in favor of the lessor,[1] and declare that, contrary to the general doctrine, a forfeiture in this class of cases is favored.

The principle which governs the termination of rights under such leases is expressed as follows in a late case:

> To fully enforce these and other duties and obligations of operation and use under this class of instruments has led courts of equity to modify and to a certain extent reverse its well-established rule of abhorrence of forfeiture, so that such forfeiture is favored, when, instead of working loss or injury contrary to equity, it promotes justice and equity and protects the owner against the indifference, laches and injurious conduct of the lessee.[2]

The lessee must make a lease profitable to the lessor, and is not permitted to tie up the land indefinitely.[3]

Kansas Nat. Gas Co., 81 Kan. 553, 106 Pac. 47, 49, 34 L. R. A., N. S., 34; Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co., 126 Fed. 623, 625, 61 C. C. A. 359. See, also, Tennessee Oil, Gas & Mineral Co. v. Brown, 131 Fed. 696, 699, 65 C. C. A. 524.

100 Acme Oil Co. v. Williams, 140 Cal. 681, 74 Pac. 296, 297. See, also, Payne v. Neuval, 155 Cal. 46, 99 Pac. 476, 479.

1 Rawlings v. Armel, 77 Kan. 778, 79 Pac. 683, 686.

2 Doddridge Oil & Gas Co. v. Smith, 154 Fed. 970, 978; Chapple v. Kansas Vitrified Brick Co., 70 Kan. 723, 79 Pac. 666, 668.

3 Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 658, 59 L. R. A. 566, 22 Morr. Min. Rep. 145.

But a clause in a lease which fixes and vests rights upon the discovery of oil in paying quantities is construed to be made in the interest of the lessee, and it is for him to say whether the product is in paying quantities.[4]

Where a lessor has received the full consideration of an oil lease for a term of years, and the lease contains no forfeiture clause, delay or neglect of the lessor to develop or extract oil will not work a forfeiture.[5]

In case of inactivity of the lessee, unless he is in actual possession of the premises, no re-entry by the lessor is necessary to terminate the lease. The execution by the lessor of a new lease to another, or any equivalent act, is sufficient.[6]

The abandonment of an oil lease is not measured by the lapse of time prescribed by the statute of limitations, but may in fact occur before that time.[7]

It is the duty of the lessee to perform his part of the contract within a reasonable time, or the grantor may consider the contract abandoned.[8]

The lessor's right to terminate the lease being optional, however, if he choose not to claim the forfeiture, he is entitled to rent until the expiration or

[4] McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 64 S. E. 1027, 1028.

[5] Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, 519.

[6] Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 980, 44 L. R. A. 107; Guffy v. Hukill, 34 W. Va. 49, 26 Am. St. Rep. 901, 11 S. E. 754, 755, 8 L. R. A. 759; Allegany Oil Co. v. Bradford Oil Co., 21 Hun (N. Y.), 26; affirmed, 86 N. Y. 638; Ray v. Western Pennsylvania Nat. Gas Co., 138 Pa. 576, 21 Am. St. Rep. 922, 20 Atl. 1065, 1066, 12 L. R. A. 290.

[7] Rawlings v. Armel, 77 Kan. 778, 79 Pac. 683, 685.

[8] Emery v. League, 31 Tex. Civ. App. 474, 72 S. W. 603, 606; Tennessee Oil Gas & Mineral Co. v. Brown, 131 Fed. 696, 699, 65 C. C. A. 524; Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co., 126 Fed. 623, 625, 61 C. C. A. 359.

surrender of the lease. The lessee cannot set up the forfeiture resulting from his own default as a defense to an action for the rent. Such provisions are for the benefit of the lessor.[9]

A lessee cannot arbitrarily surrender his oil lease on the ground that the well is not paying, if the contrary fact is reasonably established.[10]

The lessee must exercise good faith in drilling enough wells to prevent loss by drainage to neighboring wells, and in the absence of such fair conduct he will be held to strict account for the loss.[11] But, on the other hand, if he exercise good faith and honest business judgment in the number of wells drilled, equity will not interfere with his management of the business.[12]

> But neither lessor nor lessee is made the arbiter of the extent to which or the diligence with which operations shall proceed but both are bound by the standard of what is reasonable.[13]

It is not to be understood that the rule of construction favorable to the lessor in oil and gas leases will be extended so far as to work undeserved hardship. Where the lease contains no actual covenant to drill

[9] Ray v. Western Pennsylvania Nat. Gas Co., 138 Pa. 576, 21 Am. St. Rep. 922, 20 Atl. 1065, 1066, 12 L. R. A. 290; Galey v. Kellerman, 123 Pa. 491, 16 Atl. 474, 475; Wheeling v. Phillips, 10 Pa. Super. Ct. Rep. 634; Evans v. Consumer's Gas & Trust Co. (Ind.), 29 N. E. 398, 400, 31 L. R. A. 673; Roberts v. Bettman, 45 W. Va. 143, 30 S. E. 95, 96, and cases there cited; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 1096, 34 L. R. A. 62; Perry v. Acme Oil Co., 44 Ind. App. 207, 88 N. E. 859, 861; 1 Water & Min. Cas. 99.

[10] Dickey v. Coffeyville Vitrified B. & T. Co., 69 Kan. 106, 76 Pac. 398, 400.

[11] Kleppner v. Lemon, 197 Pa. 430, 47 Atl. 353, 354; Harris v. Ohio Oil Co., 57 Ohio St. 629; affirmed, 50 N. E. 1129.

[12] Colgan v. Forest Oil Co., 194 Pa. 234, 75 Am. St. Rep. 695, 45 Atl. 119, 121.

[13] Brewster v. Lanyon Zinc Co., 140 Fed. 801, 814, 72 C. C. A. 213.

wells or pay rent, and where, from the language used, none can be implied, it amounts to a mere optional right in the lessee; he cannot be held for rent in such a case, even though he has failed to expressly surrender the lease as contemplated by the contract.[14]

Moreover, where the forfeiture provided for has been strictly limited to certain species of default, for such alone can the lease be terminated.[15] Again, the lessor may waive the right to strict performance by such conduct as would make forfeiture inequitable,[16] and relief will in a proper case be given in equity from the strict consequences of an inadvertent breach by lessee.[17]

The question whether or not, within the meaning of these leases, oil or gas has been found in paying quantities will be governed by the cost of production, market prices, and the usual elements which make for profit or loss.[18]

But such profit need not be a clear profit over and above the operating expenses and the cost of wells. After the wells are completed it is enough if the product will pay a profit over the expenses.[19]

14 Snodgrass v. South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820, 821; Glasgow v. Chartiers Gas Co., 152 Pa. 48, 25 Atl. 232; Brooks v. Kunkle, 24 Ind. App. 624, 57 N. E. 260, 261; McKee v. Colwell, 7 Pa. Super. Ct. Rep. 607.

15 South Penn Oil Co. v. Stone (Tenn.), 57 S. W. 374, 377; Ammons v. South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004, 1011; Marshall v. Forest Oil Co., 193 Pa. 83, 47 Atl. 927, 928.

16 Duffield v. Michaels, 102 Fed. 820, 823, 42 C. C. A. 649; Lynch v. Versailles Fuel Gas Co., 165 Pa. 518, 30 Atl. 984; Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762, 764; Duntley v. Anderson, 169 Fed. 391, 394, 94 C. C. A. 647.

17 South Penn Oil Co. v. Edgell, 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596, 597.

18 Iams v. Carnegie Nat. Gas Co., 194 Pa. 72, 45 Atl. 54.

19 Young v. Forest Oil Co., 194 Pa. 243, 45 Atl. 121, 122, 20 Morr. Min. Rep. 345.

In reference to the question of damages arising out of breach of contracts concerning the drilling of wells, and future interests in oil wells of unknown value, the courts agree that they are of such remote and speculative character as to bring them peculiarly within the rule that the parties have the right to fix them by mutual agreement as liquidated damages.[20]

**§ 863. Correlative rights of adjoining owners of oil or gas wells, and validity of statutory regulations concerning them.**—Although not precisely within the scope of this chapter, we consider it pertinent to discuss here briefly the correlative rights of adjoining owners of oil and gas wells, and the validity of laws regulating them.

As has been heretofore stated, when oil and gas escape and go into other land, the title of the former owner is gone.[21]

Hence oil and gas may be lawfully taken by the owner of wells from the stratum underneath the land of his neighbor.[22] For that reason, a court of equity will not, in the absence of legislation regulating the mining of oil or gas, or both, in the interests of the general public, grant an injunction at the instance of a private owner of a gas well to compel the owner of an adjoining well, whose yield of gas is insufficient for beneficial or commercial purposes, to prevent the flow of gas therefrom.[23]

[20] Escondido Oil etc. Gas Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040, 1042; Gibson v. Oliver, 158 Pa. 277, 27 Atl. 961, 962; Blodget v. Columbia Livestock Co., 164 Fed. 305, 90 C. C. A. 237.

[21] Westmoreland etc. Gas Co. v. De Witt, 130 Pa. 235, 249, 18 Atl. 724, 725, 5 L. R. A. 731, 29 Amer. L. Reg. 93.

[22] Hague v. Wheeler, 157 Pa. 324, 37 Am. St. Rep. 736, 27 Atl. 714, 717, 22 L. R. A. 141.

[23] Hague v. Wheeler, 157 Pa. 324, 37 Am. St. Rep. 736, 27 Atl. 714, 716, 22 L. R. A. 141.

Nor can a party having the right to drill for oil on a given piece of land be prevented from using a pump which by reason of its power draws the oil from underneath an adjoining owner's land, for the former has the absolute and incidental right to use the most effective machinery in the prosecution of his work.[24]

In the state of Indiana, whose courts squarely hold that the owner of the surface has no title to the oil and gas in or under his land whatever until it is brought to the surface and into his actual possession, it has been determined that in the absence of regulation by law, every owner of the surface within a given gas field may prosecute his operations and reduce to possession all, or every part, if possible, of the oil or gas deposits underlying his, as well as his neighbor's, land, without violating the rights of adjoining surface owners.[25]

This rule received the approval of the supreme court of the United States.[26]

Upon this principle it was consequently decided in the same state that a person who has a natural gas well on his premises has the right to increase the natural flow of gas therein by the explosion of nitro-glycerine in the well, although it has the effect to draw gas from beneath the land of another.[27]

Coming now to the question of the power of the state to regulate the taking of oil and natural gas for the purpose of preventing waste, it will be seen that sev-

[24] Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 1075, 48 L. R. A. 748, 20 Morr. Min. Rep. 350.

[25] State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 812, 47 L. R. A. 627.

[26] Ohio Oil Co. v. Indiana, 177 U. S. 190, 200, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, 20 Morr. Min. Rep. 466.

[27] People's Gas Co. v. Tyner, 131 Ind. 277, 31 Am. St. Rep. 433, 31 N. E. 59, 60, 16 L. R. A. 443, 17 Morr. Min. Rep. 481.

eral courts determined the question in favor of the exercise of the power.

In 1894 the state of Indiana passed a law prohibiting any person, firm or corporation operating any natural gas or oil well, from allowing the escape of gas or oil therefrom into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck. The constitutionality of this law was upheld by the supreme court of that state in an elaborate opinion in State v. Ohio Oil Co.,[28] upon the ground that it was a valid exercise of the police power, and not objectionable because it operated as a taking of private property without due compensation, for the reason that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting oil and gas (the oil and gas in this instance being intermixed and brought to the surface in so-called "combination wells"), yet they had no vested property right therein until by the actual drawing of the oil and gas to the surface they had reduced these substances to possession. That in consequence of the nature of the deposits, their transmissibility, their interdependence, and of the applicable coequal rights of all the owners and the interest of the public at large, the state could lawfully exercise the power of regulating whatever rights the surface owners within the area of the gas field had in order to prevent waste of the products for their common benefit, and because in the preservation of these products

[28] 150 Ind. 21, 49 N. E. 809, 811, 47 L. R. A. 627. See, also, Townsend v. State, 147 Ind. 624, 62 Am. St. Rep. 477, 47 N. E. 19, 21, 37 L. R. A. 294.

the well-being and prosperity of the entire community were largely subserved.

This ruling was upheld by the supreme court of the United States on the appeal of the case,[29] upon the ultimate ground that the regulations of natural deposits of oil and gas and the right of the surface owner to take them as an incident of title in fee to the surface was a regulation of real property, and must be treated as relating to the preservation and protection of rights of an essentially local character, and one which comes especially within the lawful authority of the state.

A conclusion in accordance with the Indiana rule was reached by the supreme court of Kentucky;[30] and a law of the state of New York regulating the operation of mineral springs was declared by the supreme court of the United States to be founded upon the same principle, although dealing with a different mineral substance, and was accordingly declared valid upon like grounds.[31]

Finally, in the latest case on the subject, in which all the cases just cited were reviewed, the United States supreme court set the stamp of approval upon the doctrine that it is a valid exercise of the police power of the state to regulate the taking of natural products, such as oil and natural gas, and will be upheld so long as it does not interfere with the operation of interstate commerce.[32]

29 Ohio Oil Co. v. Indiana, 177 U. S. 190, 200, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, 20 Morr. Min. Rep. 466.

30 Commonwealth v. Trent, 117 Ky. 34, 4 Ann. Cas. 209, 77 S. W. 390, 393.

31 Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 72, 31 Sup. Ct. Rep. 327, 55 L. ed. 369, Ann. Cas. 1912C, 160.

32 Oklahoma (West) v. Kansas Nat. Gas Co., 221 U. S. 229, 260, 31 Sup. Ct. Rep. 564, 55 L. ed. 716, 35 L. R. A., N. S., 1193.

**§ 863a. Rights and remedies in reference to gas escaping from ground underlying a coal mine.**—These rights and remedies may be considered from two viewpoints:—

(a) As between the owner of the surface and the remainder of the *corpus* of the land, and the owner of the coal:—

If the use which the owner of the coal makes of the land for the purposes of mining the coal is the natural and proper one for that purpose, and free from negligence, there is no liability for the escaping gas to the former, and whatever damage is occasioned to the freehold is *damnum absque injuria.*

If, on the other hand, the injury was plainly to be anticipated, and preventable with reasonable care and expense, the owner of the coal would be liable for the waste occasioned by the escaping gas.[33]

In the case of Hague v. Wheeler,[34] the owner of a piece of land sought to obtain a mandatory injunction compelling an owner of an adjoining piece of land, who had drilled a well which proved to be inadequate for beneficial or commercial purposes, to close the well to prevent the escape of gas.

But the court refused the injunction upon the ground that the owner of the well owned the freehold and with it all the gas that was on it or in it, and on account of the wandering nature of the gas, the adjoining owner had no right to follow it, or assert any rights regarding it, unless the evidence disclosed the fact that his neighbor had drilled the well with malice, intending to injure the former.

[33] Collins v. Chartiers Valley Gas Co., 131 Pa. 143, 17 Am. St. Rep. 791, 18 Atl. 1012, 1013, 6 L. R. A. 280.

[34] 157 Pa. 324, 37 Am. St. Rep. 736, 27 Atl. 714, 718, 22 L. R. A. 141.

The court also said by way of *dictum* that the public had sufficient interest in the subject matter to enact legislation to prevent waste, and referred to a statute of Pennsylvania requiring the plugging of abandoned wells.

(b) As regards the public:—

That the public has such an interest in natural gas and oil as to justify legislation to prevent its waste, and that various statutes designed to prevent such waste are within the proper exercise of the police power and constitutional has been decided on several occasions.

For example: Prohibiting the burning of natural gas with so-called "flambeau" lights.[35]

Prohibiting the escape of gas from any natural gas or oil well longer than two days after gas or oil has been struck.[36]

At the present time most of the oil and gas producing states have special laws regarding the plugging of abandoned wells, the increase of the natural flow of gas, closing in wells not in use, and on kindred subjects.

None of these statutes refer to the volume of the escaping gas, or fix the minimum amount of escape which would set the prohibition of the statute in motion.

[35] Townsend v. State, 147 Ind. 624, 62 Am. St. Rep. 477, 47 N. E. 19, 20, 37 L. R. A. 294.

[36] State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 811, 47 L. R. A. 627; affirmed by U. S. supreme court in Ohio Oil Co. v. Indiana, 177 U. S. 190, 200, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, 20 Morr. Min. Rep. 466; Commonwealth v. Trent, 117 Ky. 34, 4 Ann. Cas. 209, 77 S. W. 390. As to the escape of natural gas from mineral springs, Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 72, Ann. Cas. 1912C, 160, 31 Sup. Ct. Rep. 337, 55 L. ed. 369. See, also, Oklahoma (West) v. Kansas Nat. Gas Co., 221 U. S. 229, 239, 31 Sup. Ct. Rep. 564, 55 L. ed. 716, 35 L. R. A., N. S., 1193.

It would seem to follow that the state could enact laws compelling coal miners to prevent the escape of the gas in the manner indicated, and that such law would be effective, unless it could be shown that no feasible means of prevention could be devised, or that the means taken for the prevention would make the mining impossible, in which event we take it that no legislature would take the ground that it was the public policy of the state that in order to prevent the waste of gas, it was justifiable to destroy the coal mining industry; also that such a law would be declared unconstitutional, as a taking of private property without just compensation.

# TITLE XI.

## ACTIONS CONCERNING MINING CLAIMS OTHER THAN SUITS UPON ADVERSE CLAIMS—AUXILIARY REMEDIES.

CHAPTER

I. TRESPASS—MEASURE OF DAMAGES.

II. AUXILIARY REMEDIES.

# CHAPTER I.

## TRESPASS—MEASURE OF DAMAGES.

§ 865. Introductory.
§ 866. Burden of proof in cases of underground trespasses.
§ 867. When the statute of limitations commences to run against underground trespasses.
§ 868. Measure of damages.

**§ 865. Introductory.**—In the mining regions of the west the action of trespass is largely utilized, not only for the purpose of recovering damages for the unlawful extraction of ore, but also to try the title itself, for, as a rule, the title to the property or some portion of it is involved in the litigation. The frequency with which this class of actions is encountered in the reports of the mining states is due to that feature of the federal law which permits the owner of a mine or mining claim, holding within his surface boundaries the apex of a vein, to pursue such vein, under certain conditions, into and underneath the land adjoining. So while the action is in form trespass *quare clausum fregit,* the issues naturally arising are those of ownership of the segment of the vein in dispute, and title is necessarily brought into question. The "law of the apex" is responsible for nine-tenths of the expensive litigation arising in the conduct of quartz or vein mining, and out of it have grown several interesting and novel questions. The rules governing the action in the case of underground invasion are the same, generally speaking, as where a surface trespass is committed. There are, however, certain elements in cases of underground trespasses deserving of special consideration.

As to the possession requisite to support the action of trespass or, in some states, of quieting title, it has

been held that in a location so made as to carry extralateral right, possession of the surface is possession of all veins and lodes throughout their depths, the tops or apices of which are inside the surface-lines,[1] and that such possession is actual and not constructive.[2]

Adverse possession of a claim carries with it adverse possession of all lodes apexing therein.[3] The defendant's actual possession of part of the vein beneath his surface, where the entire vein is claimed by the plaintiff under extralateral rights, does not constitute an ouster and give the defendant possession of the entire vein.[4] Obviously, where the defendant has possession of the surface and surface workings of claim X, the plaintiff's surreptitious possession of an underground drift running from an adjoining claim into claim X does not give the plaintiff sufficient possession of the claim to support a bill to quiet title[5] in such jurisdictions where possession is essential to the

[1] Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66, 72, 15 Morr. Min. Rep. 462; Pardee v. Murray, 4 Mont. 234, 2 Pac. 16, 17, 15 Morr. Min. Rep. 515; Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co., 131 Fed. 579, 583, 66 C. C. A. 299; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 121 Fed. 973, 976, 58 C. C. A. 311, 22 Morr. Min. Rep. 560; U. S. Min. Co. v. Lawson, 134 Fed. 769, 772, 67 C. C. A. 587; affirmed, Lawson v. United States Min. Co., 207 U. S. 1, 8, 28 Sup. Ct. Rep. 15, 52 L. ed. 65; Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 398; petition for rehearing denied, 31 Nev. 395, 105 Pac. 99; Montana Ore Co. v. Boston & M. Consol. C. & S. M. Co., 27 Mont. 536, 71 Pac. 1005, 1007; State ex rel. Parrott S. & C. Co. v. District Court, 28 Mont. 528, 73 Pac. 230, 234.

[2] Montana M. Co. v. St. Louis M. & M. Co., 102 Fed. 430, 435, 42 C. C. A. 415, 20 Morr. Min. Rep. 507, distinguishing Hugunin v. McCunniff, 2 Colo. 367, 370; Montana M. Co. v. St. Louis M. & M. Co., 147 Fed. 897, 913, 78 C. C. A. 33.

[3] Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 398; petition for rehearing denied, 31 Nev. 395, 105 Pac. 99.

[4] United States Min. Co. v. Lawson, 134 Fed. 769, 772, 67 C. C. A. 587; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C Co., 121 Fed. 973, 976, 58 C. C. A. 311, 22 Morr. Min. Rep. 560.

[5] Badger G. M. Co. v. Stockton G. & C. M. Co., 139 Fed. 838, 840.

maintenance of this class of actions. The question of who has possession is of much importance in certain jurisdictions where the proceedings involve trial of title, as possession is that which determines whether the remedy shall be an action at law or a suit in equity. This question is fully discussed elsewhere.[6] In this chapter it is our purpose to briefly consider, (*a*) upon whom devolves the burden of proof in this class of actions, (*b*) the application of the statute of limitations to underground trespasses, and (*c*) the measure of damages.

**§ 866. Burden of proof in cases of underground trespasses.**—Where mines are held under tenures which confine their owners to vertical planes drawn through their surface boundaries, as in the case of coal and placers in the states subject to the federal mining laws, and in all classes of mines in the older states of the Union, the burden of proof in actions of trespass rests with the plaintiff to establish his right by a preponderance of evidence, and this burden remains with him throughout the trial. But this rule, when applied to controversies arising out of the exercise of the extra-lateral right granted by the federal laws, has been challenged, and there is some conflict of authority upon the subject.

To explain the views of the courts and the shades of difference in their rulings, we will use a simple illustration. A and B are coterminous lode mining proprietors, holding title by patents from the government. B, holding the apex of a vein within his boundaries, in pursuing it on its downward course crosses the vertical planes drawn through A's surface boundaries, and extracts ore from underneath A's surface. A brings either ejectment or trespass against B. B justifies

[6] *Ante*, § 754.

his presence underneath A's surface by asserting ownership of the apex of the vein and the right to pursue it throughout its entire depth, although it may enter the land adjoining. In other words, B claims that the estate in the vein has been severed from the estate in the surface, and the estate overlying the dip of the vein is to that extent lessened.[7] The estate in the vein, assuming that the form of B's surface and the position of his apex is such as to warrant the legal conclusion that the vein has been granted throughout its entire depth, is of the same dignity as that of the surface.[8]

What legal presumptions are indulged in favor of the respective parties? How are these presumptions to be overcome, and upon whom rests the burden of proof?

The law from which both A and B derive title awards to them respectively,—

> The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations.[9]

B's vein, not having its top or apex within A's ground, does not pass to A by operation of the grant;[10]

[7] *Ante*, §§ 568, 611.

[8] *Ante*, § 568.

[9] Rev. Stats., § 2322.

[10] Montana Co., Ltd. v. Clark, 42 Fed. 626, 630, 16 Morr. Min. Rep. 81; Iron S. M. Co. v. Cheesman, 116 U. S. 529, 533, 6 Sup. Ct. Rep. 481, 29 L. ed. 713; Jones v. Prospect Mt. T. Co., 21 Nev. 339, 31 Pac. 642, 644, 17 Morr. Min. Rep. 530. See, also, Reynolds v. Iron S. M. Co., 116 U. S. 687, 688, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591;

but A, being the owner of the surface, there is a *prima facie* presumption that he owns everything underneath such surface within the vertical planes drawn through the surface boundaries.[11]

This was the rule at common law.[12]

Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 399, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436. *Ante*, § 364.

[11] Iron S. M. Co. v. Elgin M. & S. Co., 118 U. S. 196, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641; Bell v. Skillicorn, 6 N. M. 399, 28 Pac. 768, 770; Cheesman v. Shreve, 37 Fed. 36, 37, 16 Morr. Min. Rep. 79; Cheesman v. Shreve, 40 Fed. 787, 790, 17 Morr. Min. Rep. 260; Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 380, 385, Fed. Cas. No. 8158; Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513, 516; Cheesman v. Hart, 42 Fed. 98, 16 Morr. Min. Rep. 265; Jones v. Prospect Mt. T. Co., 21 Nev. 339, 31 Pac. 642, 644, 17 Morr. Min. Rep. 530; Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540, 550, 18 Morr. Min. Rep. 113; Doe v. Waterloo M. Co., 54 Fed. 935, 937; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 890, 17 Morr. Min. Rep. 59; Stevens v. Gill, 1 Morr. Min. Rep. 576, 581, Fed. Cas. No. 13,398; Driscoll v. Dunwoody, 7 Mont. 394, 16 Pac. 726, 727; Bluebird M. Co. v. Murray, 9 Mont. 468, 23 Pac. 1022, 1024; Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283, 285, 18 Morr. Min. Rep. 698; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 618, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; Parrot S. & C. Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 327, 330, 53 L. R. A. 491, 21 Morr. Min. Rep. 232; Maloney v. King, 25 Mont. 188, 64 Pac. 351, 352, 21 Morr. Min. Rep. 278; State v. District Court, 25 Mont. 572, 65 Pac. 1020, 1026; St. Louis M. & M. Co. v. Montana M Co., Ltd., 113 Fed. 900, 902, 51 C. C. A. 530, 22 Morr. Min. Rep. 127; affirmed, 194 U. S. 235, 239, 24 Sup. Ct. Rep. 654, 48 L. ed. 953; Maloney v. King, 27 Mont. 428, 71 Pac. 469, 470; Montana Ore P. Co. v. Boston & M. Consol. C. & S. Co., 27 Mont. 536, 71 Pac. 1005, 1007; State ex rel. Parrot S. & C. Co. v. District Court, 28 Mont. 528, 73 Pac. 230, 234; Maloney v. King, 30 Mont. 158, 76 Pac. 4, 5; Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 Pac. 648, 667; affirmed, 213 U. S. 72, 73, 29 Sup. Ct. Rep. 413, 414, 53 L. ed. 702; Heinze v. Boston & M. Consol. C. & S. M. Co., 30 Mont. 484, 77 Pac. 421, 423; Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 74, 3 Ann. Cas. 340; Boston & Montana Consol. C. & S. M. Co. v. Montana Ore P. Co., 188 U S. 632, 638, 23 Sup. Ct. Rep. 434, 47 L. ed. 626; Lawson v. United States, 207 U. S. 1, 8, 28 Sup. Ct. Rep. 15, 52 L. ed. 65; Keely v. Ophir Hill Consol. M. Co., 169 Fed. 601, 603, 95 C. C. A. 99.

[12] *Ante*, § 2.

Therefore, when A introduces proof of title, and if the action be trespass, shows that ore has been extracted from underneath the surface and proves its quantity and value, he is, *prima facie*, entitled to judgment.

It then devolves upon B to establish,—

(1) The existence of an apex within his boundaries;

(2) The identity and continuity of the vein from its top or apex within such boundaries to the point in dispute.[13]

So far we think the courts all agree; but as to the degree of proof required of B, and as to whether the burden shifts during the trial from one to the other, there is some difference of opinion.

Judge Bigelow, speaking for the supreme court of Nevada, announced the following rule:—

> Doubtless the production of a patent to the ground in which the ledge is found makes out a *prima facie* case for the plaintiff; that is, in the absence of any evidence tending to prove that the ledge apexes outside of the exterior lines of the plaintiff's patented ground, it would be presumed to apex inside those lines; but when evidence is produced tending to show that the ledge apexes outside those lines, this simply tends to prove that the plaintiffs, notwithstanding their patent, do not own that ledge, and they must now meet this evidence and overcome it, or they will fail in establishing their title. As the plaintiffs' ownership is denied, the burden of proving it is all along upon them. If the ownership depends upon whether the ledge apexes inside the exterior lines of the mine, then this fact, the same as any other fact upon which title depends, must be established by the party asserting it. The plaintiffs must recover upon the strength of their own title; if they do not own the ledge from which the ore was extracted, it

[13] *Ante*, § 615.

matters not who does own it.[14] Evidence showing that the ledge apexes outside the plaintiffs' ground is not offered to establish a fact by way of confession and avoidance of the plaintiffs' case, as to which the burden would be upon the defendant, but to show that they never had any case, because they never owned that ledge. The burden of showing ownership being placed by the pleadings upon the plaintiffs, it never shifts to the defendant, except in the limited sense already spoken of. This is a universal rule, applicable to all cases, and one that is supported by both reason and the great weight of authority.[15]

This doctrine seems to be supported, to some extent at least, by the decision of the supreme court of the United States in Reynolds v. Iron Silver Mining Co., referred to in the opinion of Judge Bigelow, and also by decisions of Judge Knowles[16] and Judge Hallett,[17] denying injunctions where complainant has the surface overlying the ore bodies but not the apex of the vein; but there are a number of well-considered cases wherein the doctrine is denied.

Judge Phillips, in Cheesman v. Hart,[18] held that one seeking to justify his presence underneath another's surface holds the laboring oar throughout on all vital issues, and that the burden of the real issue never shifts from him. This rule has received the approval of the supreme courts of Colorado,[19] Montana,[20]

[14] Reynolds v. Iron S. M. Co., 116 U. S. 687, 692, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591.

[15] Jones v. Prospect Mt. T. Co., 21 Nev. 339, 349, 31 Pac. 642, 644, 17 Morr. Min. Rep. 530.

[16] Montana Co. Ltd. v. Clark, 42 Fed. 626, 631, 16 Morr. Min. Rep. 81.

[17] Roxanna G. M. & T. Co. v. Cone, 100 Fed. 168, 170, 20 Morr. Min. Rep. 323.

[18] 42 Fed. 98, 105, 16 Morr. Min. Rep. 265.

[19] Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513, 516; Collins v. Bailey, 22 Colo. App. 149, 125 Pac. 543, 548.

[20] Parrot S. & C. Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386,

Dakota,[21] Utah,[22] California,[23] and New Mexico,[24] and of Judges Hallett,[25] Ross,[26] and Hawley,[27] and the circuit courts of appeals for the eighth[28] and ninth circuits.[29]

Judge Hallett's decision in Leadville Mining Co. v. Fitzgerald (*supra*) has been quoted approvingly in almost all of the cases.

> Within the lines of each location the owner shall be regarded as having full right to all that may be found, until someone can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until someone else shall show by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.

64 Pac. 327, 330, 53 L. R. A. 491, 21 Morr. Min. Rep. 232; Maloney v. King, 25 Mont. 188, 64 Pac. 351, 352, 21 Morr. Min. Rep. 278; Maloney v. King, 30 Mont. 158, 76 Pac. 4, 5.

21 Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 892, 17 Morr. Min. Rep. 59.

22 Grand Central Min. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 667; appeal dismissed, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

23 Daggett v. Yreka Min. & Mill. Co., 149 Cal. 357, 86 Pac. 968, 976.

24 Bell v. Skillicorn, 6 N. M. 399, 28 Pac. 768, 771; Lincoln Lucky & Lee M. Co. v. Hendry, 9 N. M. 149, 50 Pac. 330, 332.

25 Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 380, 389, Fed. Cas. No. 8158.

26 Doe v. Waterloo M. Co., 54 Fed. 935, 937.

27 Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540, 550, 18 Morr. Min. Rep. 113.

28 Keely v. Ophir Hill Consol. Co., 169 Fed. 601, 603, 95 C. C. A. 99.

29 Carson City G. & S. M. Co. v. North Star M. Co., 83 Fed. 658, 663, 28 C. C. A. 333, 19 Morr. Min. Rep. 118; St. Louis M. & M. Co. v. Montana M. Co., Ltd., 113 Fed. 900, 902, 51 C. C. A. 530, 22 Morr. Min. Rep. 127.

Judge Hawley sums up his views succinctly:—

> Hands off of any and everything within my surface lines, extending downward vertically, until you prove you are working upon and following a vein which has its apex within your surface claim.[30]

It is true that Judge Hallett in a late case has refused an injunction to one whose vertical boundaries had been invaded, where it clearly appeared that the apex was not in complainant's surface,[31] but it also appeared in that case that the ore in question must necessarily belong either to the defendant or to a third party not before the court. The presumption in favor of the owner of the surface seems to put the burden of proof upon him who claims the right to enter beneath such surface, until he shows not only that the vein in dispute has its apex outside such surface, but also that he himself owns such apex and in a manner not inconsistent with extralateral right to the vein in controversy. Although the surface proprietor may not himself be entitled to the vein, his possession is good as against an intruder.[32]

These rules apply to all classes of lands which may be invaded, whether agricultural or mineral.

Although the extralateral claimant must establish his rights by a preponderance of evidence,[33] we do not understand that in the case instanced there are no presumptions to be indulged in B's favor. If he estab-

30 Con. Wyoming G. & S. M. Co. v. North Star Co., 63 Fed. 540, 550, 18 Morr. Min. Rep. 113.

31 Roxanna G. M. Co. v. Cone, 100 Fed. 168, 169, 20 Morr. Min. Rep. 323.

32 Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 892, 17 Morr. Min. Rep. 59, and numerous cases there cited.

33 Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 Pac. 648, 667, quoting Judge Hallett in Leadville Min. Co. v. Fitzgerald, Fed. Cas. No. 8158, 4 Morr. Min. Rep. 380, 385.

lishes the existence of an apex, he is not compelled to show that it passes through his entire claim, crossing both end-lines, or that it actually crosses either of them, so long as it does not appear that it crosses the surface boundaries in such a manner as to deprive him of all extralateral right.[34] Nor is he compelled to show by drifts and actual openings connection between the apex at the surface and the *locus* of the alleged trespass. Conclusive proof is not required; he cannot be expected to show an actual tracing of the vein from the apex down to the point in litigation.[35] This is left to the domain of mathematics.[36] But the proof offered must be more than speculation or the intelligent guess of a mining engineer.[37] He is certainly entitled to the benefit of all presumptions of fact which logically flow, in common mining experience, from other facts which may be proved. Nor are questions of doubtful construction of the mining laws to be resolved against him.

The rule requiring him to prove apex and identity by a preponderance of evidence is not a harsh one when rationally applied. In most cases the means of establishing them are peculiarly within his reach, and in this regard he has a large advantage over his opponent. In the progress of his work from the "grass roots" to his lower workings he is afforded daily opportunities for information and knowledge, which are denied his adversary, and we cannot see that this rule reasonably invoked works any peculiar hardship.

[34] *Ante*, § 615.

[35] Daggett v. Yreka Min. & Mill. Co., 149 Cal. 357, 86 Pac. 968, 976.

[36] Silver M. Co. v. Fall, 6 Nev. 115, 123, 5 Morr. Min. Rep. 283.

[37] Heinze v. Boston & M. Consol. C. & S. M. Co., 30 Mont. 484, 77 Pac. 421, 423; Collins v. Bailey, 22 Colo. App. 149, 125 Pac. 543, 548; Colorado Cent. Consol. Min. Co. v. Turck, 50 Fed. 888, 894, 2 C. C. A. 67.

He may also, to some degree, be compensated in the conduct of a trial by being permitted to open and close the argument[38] when the assertion of an extralateral right by defendant is the sole issue.

It would also seem that since the burden of proof is on the defendant, and not merely the burden of going forward to overthrow a *prima facie* case arising from a presumption in the plaintiff's favor, fairness would require, when the assertion of an extralateral right by the defendant is the sole issue, that the defendant be allowed to open and close the evidence on that issue.[39]

In a previous section[40] we have referred to and discussed a number of cases of a more or less persuasive character which seem to sanction the doctrine that where a patent has been issued for a lode claim, the *prima facie* presumption arises that the lode exists within the claim and passes through the end-lines as patented. It is possible that under this line of cases the patent may furnish a degree of evidence which may be thrown into the balance to establish preponderance. This is nothing more than the application of a familiar doctrine that where the facts of a case are controverted and the evidence is conflicting, so that either of two results might be plausibly reached, one which would support the presumptions flowing from the patent and the other would conflict with them, a result should be reached which would harmonize with the presumptions flowing from the patent, rather than to destroy those presumptions. The discussion of section seven hundred and eighty should be read in connection with what we have here said.

38 Cheesman v. Hart, 42 Fed. 98, 105, 16 Morr. Min. Rep. 265.

39 Maloney v. King, 30 Mont. 158, 76 Pac. 4, 7.

40 § 780.

**§ 867. When the statute of limitations commences to run against underground trespasses.**—The time within which an action for trespass to real property must be commenced is fixed by statute in the different states. When that time commences to run in the case of underground trespasses has been the subject of discussion. In cases of surface damage, where ample opportunity of observation is afforded, the statute, of course, runs from the date the act is committed. In cases of underground or concealed trespasses, it has been urged that it should only be set in motion from the date the injured party discovers that his rights have been invaded, or from the date when the fact of trespass could have been discovered by the exercise of reasonable diligence.

An adjoining mine owner has no access to the underground works of his neighbor. It is by no means a difficult matter for such neighbor to drift across his line, following the trend of an ore body, extract the ore from an adjoining mine, and conceal the fact of the trespass for an indefinite period.

It has been contended that such a trespass is a species of fraud, and that the rule applicable to cases of fraud and fraudulent concealment should apply to these secret invasions of another's rights, and that the statute should not commence to run until the discovery.

In Montana,[41] New Mexico,[42] Nevada,[42a] Ohio,[43] and Utah,[44] it is provided by statute that the time does not commence to run until the discovery by the aggrieved

[41] Gen. Laws Mont. 1893, p. 50; Rev. Code Civ. Proc. (1895), § 524; Rev. Codes 1907, § 6449.

[42] Comp. Laws 1897, §§ 2916, 2918.

[42a] Rev. Laws 1912, § 4967.

[43] Rev. Stats., § 4982; Gen. Code 1910, § 11,224.

[44] Rev. Stats. (1898), § 2877; Comp. Laws 1907, § 2877; Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co., 36 Utah, 329, 103 Pac. 881, 884.

party of the facts constituting the trespass; but in the absence of such statutory declaration, the rule is to be determined from the application of general principles.[45]

In England, the rule at one time prevailed that in actions at law the statute of limitations began to run from the date of the trespass, but in equity the plaintiff might plead concealment, lack of knowledge, or opportunity for ascertaining the facts as a bar to the running of the statute.[46]

In modern practice, however, the same rules apply in law and equity, and it is held that the statute does not run against an action for an intentional underground trespass until the injured party either knew or had reasonable opportunity to know of the trespass.[47]

In one of these English cases the rule was declared to be the same, whether such trespass was intentional, and therefore fraudulent, or unintentional.

[45] Most states provide simply that an action for waste or trespass upon real property must be commenced within a certain time; they usually also provide that in cases of fraud, an action must be begun within a certain time after the discovery thereof. Colorado, six years. Colo. Rev. Stats. 1908, § 4061. Fraud, three years. Id., § 4072. Arizona, two years. Rev. Stats. 1901, § 2950. Arkansas, five years. Kirby's Dig. 1904, § 5064. California, three years. Code Civ. Proc., § 338. Fraud, three years. Id., § 338. Idaho, three years. Rev. Codes 1908, § 4054. North Dakota, six years. Rev. Codes 1905, § 6287. Fraud, six years. Id., § 6287. Oregon, six years. Lord's Or. Laws 1910, Code Civ. Proc., § 6. Fraud, six years. Id., § 391. Oklahoma, two years. Comp. Laws 1909, § 5548. South Dakota, six years. Rev. Codes 1903, Code Civ. Proc., § 60. Fraud, six years. Id., § 60. Washington, three years. Rem. & Bal. Codes 1910, Code Civ. Proc., § 159. Fraud, three years. Id., § 159. Wyoming, four years. Wyo. Comp. Stats. 1910, § 4300. Fraud, four years. Id., § 4300.

[46] Hunter v. Gibbons, 1 Hurl. & N. 459.

[47] Eccles. Commrs. v. N. E. Ry. Co., L. R. 4 Ch. Div. 845, 12 Morr. Min. Rep. 609. See, also, Gibbs v. Guild, 9 Q. B. Div. 67; Dennis v. Shuckburgh, 4 Younge & C. Eq. Ex. 53; Dean v. Thwaite, 21 Beav. 621, 1 Morr. Min. Rep. 77.

> For the purpose of the statute, the breaking of bounds into your neighbor's colliery must be considered a fraudulent act. . . . . The statute begins to run only from the time the fraud was discovered or by reasonable diligence might have been discovered.[48]

In a late English case before the privy council, of an intentional trespass, the rule was reaffirmed, with an *obiter* disapproval of the doctrine as applied to inadvertent trespass,[49] and in another case in the same year (1899) it was squarely held that an honest inadvertent trespass was not a fraud which would prevent the statute from running.[50]

The supreme court of Ohio, in the case of Williams v. Pomeroy Coal Co.,[51] said that there is no distinction in the application of the statute of limitations between trespasses underground and upon the surface, nor whether the cause of action is known or unknown to the plaintiff within the time limited by the statute. This case followed and relied upon the doctrine announced in Hunter v. Gibbons (*supra*), which is no longer authority upon that question.[52] Since this decision the legislature of Ohio has passed a statute providing that in cases of underground trespass the statute of limitations shall only begin to run from the discovery of such trespass.[53]

In Pennsylvania it has been decided that the statute runs only "from the time of the actual discovery, or the time when discovery was reasonably possible," whether the trespass be intentional or otherwise. The

48 L. R. 4 Ch. Div. 845, 860.
49 Bulli Coal M. Co. v. Osborne, [1899] App. Cas. 351, 362.
50 In re Astley Coal Co. & Tyldesley Coal Co., 68 L. J. Q. B. 252.
51 37 Ohio St. 583, 589, 6 Morr. Min. Rep. 195.
52 Bulli Coal M. Co. v. Osborne, [1899] App. Cas. 351, 362.
53 Ohio Rev. Stats. 1890, § 4982; Gen. Code 1910, § 11,224.

supreme court of that state in a well-considered opinion[54] reviews the English and American cases on analogous questions and says:—

> Mere ignorance will not prevent the running of the statute in equity any more than at law; but there is no reason resting on general principles why ignorance that is the result of defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer. . . . .
>
> The case at bar affords an excellent illustration of ignorance due to the defendant's conduct and without fault on the part of plaintiff. The defendant was mining its own coal through its own shafts or drifts opened on its own lands. In the course of its operations and for its own convenience it pushed an entry or passage under the plaintiff's lands and appropriated the coal removed therefrom. It was bound to know its own lines and to keep within them. If by mistake or for any other reason it did invade the mineral estate of another, and remove and appropriate the coal therefrom, good conscience required that it should disclose the fact and pay for the coal taken. Its failure to do this is, in its effects, a fraud upon the injured owner, and if he has no knowledge of the trespass and no means of knowledge, such a fraud, whether it be called constructive or actual, should protect him from the running of the statute.
>
> The law does not require impossibilities. It recognizes natural conditions and the immutability of natural laws. The owner of the surface cannot see, and because he cannot see, the law does not require him to take notice of what goes on in the subterranean estates below him, with which he has no communication through openings within his inclosure or under his control. . . . . In the case before us, no severance of the coal from the surface has taken

[54] Lewey v. H. C. Fricke Coke Co., 166 Pa. 536, 45 Am. St. Rep. 684, 31 Atl. 261, 28 L. R. A. 283, 18 Morr. Min. Rep. 179.

place. The title of the plaintiff extends from the surface to the center, but actual possession is confined to the surface.

Upon the surface he must be held to know all that the most careful observation by himself and his employees could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer. But in the coal veins, deep down in the earth, he cannot see. Neither in person nor by his servants nor employees can he explore their recesses in search for an intruder. If an adjoiner goes beyond his own boundaries in the course of his mining operations, the owner on whom he enters has no means of knowledge within his reach. Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. This would require the services of a competent mining engineer and his assistants inside the mines of another, which he would have no right to insist upon. To require an owner under such circumstances to take notice of a trespass upon his underlying coal at the time it takes place, is to require an impossibility; and to hold that the statute begins to run at the date of the trespass, is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible. . . . . We are disposed to hold, therefore, that the statute runs against an injury committed in or to a lower stratum from the time of actual discovery, or the time when discovery was reasonably possible.[55]

The principle that undiscovered fraud prevents the running of the statute as well at law as in equity[56] has now become very generally recognized, and in many states has been expressly sanctioned by statute. It seems, upon clear principle and by the decided weight of authority, that an intentional underground trespass is an actual fraud which prevents the running of the

[55] Followed in Gotshall v. Langdon, 16 Pa. Super. Ct. Rep. 158.

[56] Kane v. Cook, 8 Cal. 449, 458.

statute until discovery;[57] that in the case of an unintentional trespass the same rule ought to govern, upon the theory that the negligent commission of an undiscoverable trespass, the appropriation of the fruits thereof by the tort-feasor, and his failure to disclose the truth to the injured party, together constitute a constructive fraud. Every principle which induced the courts to postpone the running of the statute until the discovery of actual fraud is of equal application to the species of constructive fraud under consideration.[58]

**§ 868. Measure of damages.**—The measure of damages in an action for unlawfully extracting ore from the premises of another depends upon whether the invasion of the premises was through inadvertence or honest mistake or was willful.

If the trespass is the result of an honest mistake, the defendant is compelled to pay only the value of the ore as it was in the mine, and can, therefore, limit the recovery: first, by the value of what is taken; second, by the cost of mining, extraction, hoisting to the surface, or delivering it at the pit's mouth.[59]

If, on the other hand, the defendant takes out the ore, not as the result of an honest mistake, or an honest intention, but under circumstances which show that he has knowledge of the situation, he is entitled to no deduction, and he may not reduce the recovery by proving the cost of mining.[60]

[57] Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, 774, Ann. Cas. 1913C, 1093, collecting authorities.

[58] Lewey v. H. C. Fricke Coke Co., 166 Pa. 536, 544, 45 Am. St. Rep. 684, 31 Atl. 261, 28 L. R. A. 283, 18 Morr. Min. Rep. 179; Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146.

[59] Hall v. Abraham, 44 Or. 477, 75 Pac. 882, 883.

[60] St. Clair v. Cash Gold M. & M. Co., 9 Colo. App. 235, 47 Pac. 466, 468, 18 Morr. Min. Rep. 523.

> Having been guilty of a willful trespass, they shall reap no benefit from their own wrong, and shall pay the value of the ore, without credit for the labor incident to its extraction.[61]

These rules have been fully sanctioned and approved by the courts of the United States, both federal and state.[62] By a uniform line of authorities in the Eng-

[61] Id.

[62] Woodenware Co. v. United States, 106 U. S. 432, 433, 1 Sup. Ct. Rep. 398, 27 L. ed. 230; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 434, 12 Sup. Ct. Rep. 877, 36 L. ed. 762, 17 Morr. Min. Rep. 488; Pine River Logging Co. v. United States, 186 U. S. 279, 292, 22 Sup. Ct. Rep. 920, 46 L. ed. 1164; United States v. St. Anthony R. R. Co., 192 U. S. 524, 542, 24 Sup. Ct. Rep. 333, 48 L. ed. 548; Alta M. & S. Co. v. Benson M. & S. Co., 2 Ariz. 362, 16 Pac. 565, 567; United States v. Ute Coal & Coke Co., 158 Fed. 20, 23, 85 C. C. A. 302; Backer v. Penn Lubricating Co., 162 Fed. 627, 631, 89 C. C. A. 419; Turner v. Seep, 167 Fed. 646, 652, 102 C. C. A. 368; Central Coke & Coal Co. v. Penny, 173 Fed. 340, 344, 97 C. C. A. 597; Resurrection G. M. Co. v. Fortune G. M. Co., 129 Fed. 668, 679, 64 C. C. A. 180; Liberty Bell Gold Min. Co. v. Smuggler-Union Min. Co., 203 Fed. 795, 806; Conn v. Rice, 204 Fed. 181, 191; Cheesman v. Shreve, 40 Fed. 787, 798, 17 Morr. Min. Rep. 260; Cheeney v. Nebraska & C. Stone Co., 41 Fed. 740, 741; Colorado Cent. Cons. M. Co. v. Turck, 70 Fed. 294, 301, 17 C. C. A. 128; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Saw. 355, 34 Fed. 515, 521, 15 Morr. Min Rep. 581; Omaha etc. Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925, 930, 5 L. R. A. 236, 16 Morr. Min. Rep. 184; Waters v. Stevenson, 13 Nev. 157, 167, 29 Am. Rep. 293; Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347, 353; Dougherty v. Chestnutt, 86 Tenn. 1, 5 S. W. 444, 446; Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 284, 30 L. R. A. 803; Forsyth v. Wells, 41 Pa. 291, 296, 80 Am. Dec. 617, 14 Morr. Min. Rep. 493; Ege v. Kille, 84 Pa. 333, 339, 10 Morr. Min. Rep. 212; State v. Pacific Guano Co., 22 S. C. 50; Austin v. Huntsville Coal & M. Co., 72 Mo. 535, 545, 37 Am. Rep. 446, 9 Morr. Min. Rep. 115; Winchester v. Craig, 33 Mich. 205, 208; Heard v. James, 49 Miss. 236, 245; Baker v. Wheeler, 8 Wend. 505, 24 Am. Dec. 66, 69; Coal Creek M. & M. Co. v. Moses, 15 Lea, 300, 307, 54 Am. Rep. 415, 15 Morr. Min. Rep. 544; Durant M. Co. v. Percy Con. M. Co., 93 Fed. 166, 35 C. C. A. 252, 20 Morr. Min. Rep. 27; Golden Reward M. Co. v. Buxton M. Co., 97 Fed. 413, 420, 38 C. C. A. 228; Thomas Pressed Brick Co. v. Herter, 60 Ill. App. 58; McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 N. E. 174, 175; Lyons v. Central Coal & Coke Co., 239 Mo. 626, 144 S. W. 503,

lish courts, and without serious dissent, these rules have been sanctioned and approved.[63]

In Illinois the trespasser is not allowed to deduct the costs of mining even where the trespass was inadvertent, provided it was negligent.[64] Upon the question of what constitutes negligence in this regard, it seems to be well settled that it is one's duty to know his own boundaries.[65]

> It is the duty of everyone to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and a jury may lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them.[66]

Negligence, or inadvertence, however, usually will not result in the application of the harsher rule if the

504; Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, 777, Ann. Cas. 1913C, 1093; Hall v. Abraham, 44 Or. 477, 75 Pac. 882, 883; Silver King C. M. Co. v. Silver King C. M. Co., 204 Fed. 166, 178.

[63] Eccles. Commrs. v. N. E. Ry. Co., L. R. 4 Ch. D. 845, 860, 12 Morr. Min. Rep. 609; Livingston v. Rawyards Coal Co., L. R. 5 App Cas. 25, 31, 10 Morr. Min. Rep. 291 (cited and quoted in Woodenware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. Rep. 398, 27 L. ed. 230); Wood v. Morewood, 3 Q. B. 440, 10 Morr. Min. Rep. 77; Trotter v. Maclean, L. R. 13 Ch. D. 574, 585.

[64] Donovan v. Cons. Coal Co., 187 Ill. 28, 79 Am. St. Rep. 206, 58 N. E. 290, 291, 21 Morr. Min. Rep. 91.

[65] Lewey v. Fricke Coke Co., 166 Pa. 536, 45 Am. St. Rep. 684, 31 Atl. 261, 262, 28 L. R. A. 283, 18 Morr. Min. Rep. 179; Ilsley v. Wilson, 42 W. Va. 757, 26 S. E. 551, 555; Donovan v. Cons. Coal Co., 187 Ill. 28, 79 Am. St. Rep. 206, 58 N. E. 290, 291, 21 Morr. Min. Rep. 91; Little Pittsburg Cons. M. Co. v. Little Chief Cons. M. Co., 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 763, 15 Morr. Min. Rep. 655.

[66] Durant M. Co. v. Percy Cons. M. Co., 93 Fed. 166, 167, 35 C. C. A. 252, 20 Morr. Min. Rep. 27. See, also, Matoa Gold M. Co. v. Chicago Cripple Creek G. M. Co., 78 Min. & Sci. Press, 374.

trespasser acts in good faith.[67] The fact that the trespasser knew of an adverse claim does not prove that he acted willfully,[68] but if he acts recklessly and makes no effort to ascertain his boundaries, he will be held to have acted in bad faith,[69] for the law imposes upon an owner the burden of ascertaining his boundaries by a survey.[70] The act of trespassing creates a presumption of willfulness and puts on the defendant not merely the burden of going forward, but makes it necessary for him to prove by a preponderance of the evidence that he acted in good faith.[71]

In some states the rule is relaxed, even in cases of willful trespass, so that the measure of damages is practically the same in cases of innocent and willful extraction and removal.[72]

Where the trespass is willful, it would seem on theory that Mr. Justice Miller's rule in Woodenware Co. v. United States,[73] that the owner is entitled to the value of the timber at the time of the suit, should be applied in cases of underground trespass and that the plaintiff should recover not merely the value of the ore when mined and raised to the surface, but its value

67 Central Coal & Coke Co. v. Penny, 173 Fed. 340, 345, 97 C. C. A. 597; Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 680, 64 C. C. A. 180.

68 Backer v. Penn Lubricating Co., 162 Fed. 627, 632, 89 C. C. A. 419.

69 Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 679, 64 C. C. A. 180; Liberty Bell Gold Min. Co. v. Smuggler-Union M. Co., 203 Fed. 795, 799.

70 Orphan Belle Min. & Mill. Co. v. Pinto Min. Co., 35 Colo. 564, 85 Pac. 323, 325.

71 United States v. Ute Coal & Coke Co., 158 Fed. 20, 23, 85 C. C. A. 302; Liberty Bell Gold Min. Co. v. Smuggler-Union M. Co., 203 Fed. 795, 802.

72 Single v. Schneider, 24 Wis. 299, 301; Weymouth v. Railroad Co., 17 Wis. 550, 553, 84 Am. Dec. 763.

73 106 U. S. 432, 435, 1 Sup. Ct. Rep. 398, 27 L. ed. 230.

when milled.[74] Many of the cases, especially those involving the conversion of coal, fix on the value at the mouth of the pit; but in these cases any difficulty as to an additional value arising from transportation to the market or milling does not seem to have been raised.[75] The supreme court of California has held that its statutes[76] limit the owner in cases of willful trespass to the value of the ore minus the cost of mining and milling, unless there is fraud or malice involved;[77] an earlier case involving an inadvertent trespass fixed the measure of damages as "the value of the gold-bearing earth at the time it was separated from the surrounding earth and became a chattel."[78]

If the trespass is inadvertent, the prevailing view fixes, as the standard of damages, the value of the ore in place, not at the time the conversion actually occurs, i. e., on severance from the vein,[79] thereby differing from the doctrine of the supreme court in timber cases,[80] where recovery is allowed for the value of the

[74] Liberty Bell Gold Min. Co. v. Smuggler-Union M. Co., 203 Fed. 795, 806, and cases there cited.

[75] Central Coal & Coke Co. v. Penny, 173 Fed. 340, 344, 97 C. C. A. 597; United States v. Ute Coal & Coke Co., 158 Fed. 20, 23, 85 C. C. A. 302; Lyons v. Central Coal & Coke Co., 239 Mo. 626, 144 S. W. 503, 505; Austin v. Huntsville Coal & Min. Co., 72 Mo. 535, 544, 37 Am. Rep. 446; McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 N. E. 174, 175.

[76] Civ. Code, §§ 3294, 3333, 3336.

[77] Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, 777, Ann. Cas. 1913C, 1093. See, also, Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 413, 420, 38 C. C. A. 228.

[78] Maye v. Yappen, 23 Cal. 306, 311, 10 Morr. Min. Rep. 101; Goller v. Fett, 30 Cal. 481, 485, 11 Morr. Min. Rep. 171; Empire G. M. Co. v. Bonanza G. M. Co., 67 Cal. 406, 7 Pac. 810, 812.

[79] Lyons v. Central Coal & Coke Co., 239 Mo. 626, 144 S. W. 503, 505; but see Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, 778, Ann. Cas. 1913C, 1093.

[80] United States v. St. Anthony R. R. Co., 192 U. S. 524, 542, 24 Sup. Ct. Rep. 333, 48 L. ed. 548. This result is fully discussed and the authorities collected in John W. Henderson, 40 L. D. 518.

severed, not the standing, trees.[81] The method of ascertaining the value of the ore in place usually adopted is to deduct from the value of the ore at the surface the cost of mining and transporting thereto; but a conflict exists as to whether the actual cost of transportation and mining or the actual cost plus the expense of construction of drifts and general maintenance shall be deducted.[82] If the locality is one where mining property is commonly leased on a royalty basis, and if the plaintiff is not actually mining himself, the supreme court of Missouri limits recovery to the amount of the royalty in order to give the trespasser the profit involved in the mining;[83] this doctrine, though objectionable as resulting in a forced sale of the owner's ore, is nevertheless a convenient one.

The supreme court of the United States, in the case of Woodenware Co. v. United States,[84] after reviewing

[81] Lyons v. Central Coal & Coke Co., 239 Mo. 626, 144 S. W. 503, 505; Colorado Cent. Consol. Min. Co. v. Turck, 70 Fed. 294, 301, 17 C. C. A. 128; Waters v. Stevenson, 13 Nev. 157, 167, 29 Am. Rep. 293; Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617, 619, 620 (note); Ege v. Kille, 84 Pa. 333, 340; Austin v. Huntsville Coal & Min. Co., 72 Mo. 535, 544, 37 Am. Rep. 446; Turner v. Seep, 167 Fed. 646, 652, 102 C. C. A. 368; Durant Min. Co. v. Percy Consol. Min. Co., 93 Fed. 166, 167, 35 C. C. A. 252, 20 Morr. Min. Rep. 27; Warrior Coal & Coke Co. v. Mabel Min. Co., 112 Ala. 624, 20 South. 918.

[82] Lyons v. Central Coal & Coke Co., 239 Mo. 626, 144 Pac. 503, 505; Colorado Cent. Consol. Min. Co. v. Turck, 70 Fed. 294, 302, 17 C. C. A. 128; Ege v. Kille, 84 Pa. 333, 340; Hall v. Abraham, 44 Or. 477, 75 Pac. 882, 883; McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 N. E. 174, 175.

[83] Lyons v. Central Coke & Coal Co., 239 Mo. 626, 144 S. W. 503, 505; Turner v. Seep, 167 Fed. 646, 653, 102 C. C. A. 368; Colorado Cent. Consol. Min. Co. v. Turck, 70 Fed. 294, 302, 17 C. C. A. 128; Hall v. Abraham, 44 Or. 477, 75 Pac. 882, 883; Bennett Jellico Coal Co. v. East Jellico Coal Co., 152 Ky. 838, 154 S. W. 922, 928.

[84] 106 U. S. 432, 433, 1 Sup. Ct. Rep. 398, 27 L. ed. 230; Pine River Logging Co. v. United States, 86 U. S. 279, 293, 22 Sup. Ct. Rep. 920, 46 L. ed. 1164.

the American cases, concluded that the weight of authority sustains the doctrine there announced, that in innocent or unintentional trespasses the trespasser may deduct the cost of mining and raising to the surface, but if the invasion is willful, no such deduction can be made.

Where ore has been mined and raised to the surface, and a demand is made for it and refused, it has been held that the owner may recover the value in the condition it was at the time the demand was made.[85] Such a result, based upon the common-law distinction between trespass and trover, seems in conflict with modern theories of pleading.

In all cases where there is an unlawful invasion of another's right, the law presumes at least nominal damages, and a defendant, however innocent of intentional wrongdoing, would not be permitted to avoid a judgment on the ground that the cost of mining exceeded the value of the ore.[86]

It is the duty of the owner of a mine on approaching his boundaries to make surveys to prevent encroachments on the adjoining lands, and the least evidence of bad faith on his part would make every intendment in favor of the injured party.[87]

[85] Maye v. Yappen, 23 Cal. 306, 311; Robertson v. Jones, 71 Ill. 405, 406, 10 Morr. Min. Rep. 190.

[86] Attwood v. Fricot, 17 Cal. 37, 44, 76 Am. Dec. 567, 2 Morr. Min. Rep. 305; Empire G. M. Co. v. Bonanza G. M. Co., 67 Cal. 406, 7 Pac. 810, 812; Lyons Central Coal & Coke Co., 239 Mo. 626, 144 S. W. 503, 505. For valuable notes citing cases on measure of damages in actions of trespass, consult 36 Am. Rep. 770; 26 Am. Rep. 525; 33 Am. Rep. 68, 282; 24 Am. Dec. 70.

[87] Coal Creek M. & M. Co. v. Moses, 15 Lea, 300, 307, 54 Am. Rep. 415; Durant M. Co. v. Percy Cons. M. Co., 93 Fed. 166, 35 C. C. A. 252, 20 Morr. Min. Rep. 27; Orphan Belle Min. & Mill. Co. v. Pinto Min. Co., 35 Colo. 564, 85 Pac. 323, 325.

When one has the means of ascertaining a boundary line, he is guilty of negligence in not ascertaining its location.[88]

The good faith of a trespasser is a question for the jury.[89]

In an action for damages for taking ore from a mining claim, the plaintiff labors under great difficulty in proving the exact amount of damages he has sustained, and the defendant has the means in his power of showing the correct amount of ore taken out; and if he neglects to do so, he cannot complain that the jury by their verdict have fixed a large estimate upon the damages.[90]

So in willful trespass, or where the defendant has mingled the ore, or taken any steps to prevent ultimate proof of its value, these acts are to be taken against the defendant, even so far as to throw the burden of proving the value upon the defendant.[91]

The plaintiff may introduce evidence as to the value of ore taken from a neighboring mine, and if such valuation is excessive, the defendant has the burden of proving it to be such.[92]

88 Maye v. Yappen, 23 Cal. 306, 309.

89 St. Clair v. Cash G. M. & M. Co., 9 Colo. App. 235, 47 Pac. 466, 468, 18 Morr. Min. Rep. 523.

90 Antoine Co. v. Ridge Co., 23 Cal. 219, 221, 10 Morr. Min. Rep. 97; Matoa G. M. Co. v. Chicago Cripple Creek G. M. Co., 78 Min. & Sci. Press, 374.

91 Little Pittsburg Co. v. Little Chief etc. Co., 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 763, 15 Morr. Min. Rep. 655; Cheesman v. Shreve, 40 Fed. 787, 798, 17 Morr. Min. Rep. 260; St. Clair v. Cash Gold M. etc. Co., 9 Colo. App. 235, 47 Pac. 466, 469, 18 Morr. Min. Rep. 523; Maloney v. King, 30 Mont. 158, 76 Pac. 4, 8; Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, 779, Ann. Cas. 1913C, 1093; Little v. Greek, 233 Pa. 534, 82 Atl. 955, 957.

92 Montana Min. Co. v. St. Louis Min. & Mill. Co., 183 Fed. 51, 70, 105 C. C. A. 343.

> When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of a loss, the law will aid a recovery against the wrongdoer, and supply the deficiency of proof caused by his misconduct by making every reasonable intendment against him and in favor of the party injured. . . . . A man who willfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear all the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if the parts cannot be discriminated, or responding in damages for the highest value at which the property can reasonably be estimated.[93]

An amount equal to interest on the value of the ore from the time of the conversion seems to be recoverable as damages whether specially provided by statute or not.[94]

In code pleading it need not appear whether the action is in trespass *quare clausum* or conversion;[95] even where it is necessary to ascertain the theory on which the plaintiff proceeds in order to determine whether the action is local or transitory and to decide the measure of damages, the courts have held that, if

[93] Armory v. Delamirie, 1 Strange, 505, 93 Eng. Reprint, 664, 10 Morr. Min. Rep. 62.

[94] New Dunderberg M. Co. v. Old, 97 Fed. 150, 155, 38 C. C. A. 69; Golden Reward M. Co. v. Buxton M. Co., 97 Fed. 413, 423, 38 C. C. A. 228; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 538, 28 Sup. Ct. Rep. 367, 52 L. ed. 606; Montana Min. Co. v. St. Louis Min. & Mill. Co., 183 Fed. 51, 70, 105 C. C. A. 343.

[95] Pioneer Min. Co. v. Mitchell, 190 Fed. 937, 939, 111 C. C. A. 571.

there is no allegation of injury to the land, a suit in trespass is for all purposes a suit in trover.[96]

[96] Stone v. United States, 167 U. S. 178, 182, 17 Sup. Ct. Rep. 778, 42 L. ed. 127; United States v. Ute Coal & Coke Co., 158 Fed. 20, 22, 85 C. C. A. 302; Montana Min. & Mill. Co. v. St. Louis Min. & Mill. Co., 183 Fed. 51, 70, 105 C. C. A. 343; Central Coal & Coke Co. v. Perry, 173 Fed. 340, 344, 97 C. C. A. 597; Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 413, 422, 38 C. C. A. 228; but see Kentucky Coal Lands Co. v. Mineral Dev. Co., 191 Fed. 899, 919.

# CHAPTER II.

## AUXILIARY REMEDIES.

§ 872. Injunction. | § 873. Inspection and survey.

§ 872. **Injunction.**—It was formerly the practice in equity, in cases of alleged trespasses on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to title was deemed sufficient to exclude the jurisdiction of the court. This doctrine has been greatly modified in modern times, and it is now a common practice to grant an injunction in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction, pending legal proceedings for the determination of the legal title.[1]

It comports more with substantial justice to both parties to restrain the trespass than to leave the plaintiff to pursue his remedy at law.[2]

[1] Justice Field in Erhardt v. Boaro, 113 U. S. 537, 538, 5 Sup. Ct. Rep. 565, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. 129, 130, 17 Morr. Min. Rep. 658; Oolagah Coal Co. v. McCaleb, 68 Fed. 86, 88, 15 C. C. A. 270; Dimick v. Shaw, 94 Fed. 266, 267, 36 C. C. A. 347, 20 Morr. Min. Rep. 49; Waterloo M. Co. v. Doe, 82 Fed. 45, 47, 27 C. C. A. 50, 19 Morr. Min. Rep. 1; Northern Pac. Ry. Co. v. Soderberg, 86 Fed. 49, 51; Buskirk v. King, 72 Fed. 22, 24; Parker v. Furlong, 37 Or. 248, 62 Pac. 490, 90 C. C. A. 289; McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 N. E. 174, 175; Anderson v. Miami Lumber Co., 59 Or. 149, 116 Pac. 1056, 1060.

[2] Merced M. Co. v. Fremont, 7 Cal. 317, 320, 68 Am. Dec. 262 (quoting Chancellor Johnson in Kinsler v. Clark, 2 Hill Ch. 618).

In all cases of this character, an injunction should be granted, pending the determination of the issue as to ownership, unless it appear that the plaintiff's title is bad, or, at least, that there is no reasonable ground for the assertion of title by the plaintiff. The mere existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction.[3]

Always, in questions of injunction against the working of mines, the doubt should be resolved in favor of granting the writ.[4]

A denial of the preventive remedy by injunction, where the injuries complained of are of a character calculated to destroy the value of the land for all useful purposes, would be tantamount to a denial of all protection.[5] So, too, where the defendant threatens to prevent the plaintiff from completing work necessary to perfect his location,[6] or a lessor prevents a lessee from taking out gold from the leased property, and thus defeats the sole object of the lease.[7]

The right to injunctive relief in cases involving extraction of ore in a mine is well settled, particularly in the mining states and territories of the west.[8]

[3] Hunt v. Steese, 75 Cal. 620, 624, 17 Pac. 920, 922; Hess v. Winder, 34 Cal. 270, 272; Buskirk v. King, 72 Fed. 22, 24, 18 C. C. A. 418; King v. Campbell, 85 Fed. 814, 819; Stewart Min. Co. v. Ontario Min. Co., 23 Idaho, 280, 129 Pac. 932, 936.

[4] Judge Beatty, in Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662 (696), 23 Pac. 547, 17 Morr. Min. Rep. 310; Anaconda Copper M. Co. v. Heinze, 27 Mont. 161, 69 Pac. 909, 912, 22 Morr. Min. Rep. 346; Safford v. Flemming, 13 Idaho, 271, 89 Pac. 827, 828; Stewart Min. Co. v. Ontario Min. Co., 23 Idaho, 280, 129 Pac. 932, 936; 1 High on Injunctions, §§ 730, 735.

[5] Henshaw v. Clark, 14 Cal. 460, 465, 14 Morr. Min. Rep. 434.

[6] Stafford v. Flemming, 13 Idaho, 271, 89 Pac. 827, 828.

[7] Halla v. Rogers, 176 Fed. 709, 712, 714, 100 C. C. A. 263.

[8] Chapman v. Toy Long, 4 Saw. 28, Fed. Cas. No. 2610, 1 Morr. Min. Rep. 497; Bishop v. Baisley, 28 Or. 119, 41 Pac. 936, 942; Muldrick v. Brown, 37 Or. 185, 61 Pac. 428, 429; Le Roy v. Wright, 4

The uncertain and fluctuating value of mining property that induces a court of equity to grant injunctive relief with freedom also leads the court to apply the doctrine of laches rigorously. Both state and federal courts will deny relief of an equitable nature where a plaintiff has delayed for a considerably less time than the statutory period. The supreme court of the United States has established a doctrine that the increase in value of the subject matter of the suit is a cogent reason for denying equitable relief;[9] clearly a plaintiff who delays in order to see whether or not the mine is worth the cost of litigation is not entitled to a chancellor's consideration. In mining litigation, where values change so suddenly, a plaintiff must act promptly and diligently, or be left entirely to his legal remedies.[10] Failure to prosecute a suit vigorously after it has been started may be considered laches,[11] and a court will deny relief for lack of diligence, on its own initiative, even though the objection has not been

Saw. 530, 535, Fed. Cas. No. 8273; Cheesman v. Shreve, 37 Fed. 36, 37, 16 Morr. Min. Rep. 79; Derry v. Ross, 5 Colo. 295, 297, 1 Morr. Min. Rep. 1; Allen v. Dunlap, 24 Or. 229, 232, 33 Pac. 675, 676; Boyd v. Desrozier, 20 Mont. 444, 52 Pac. 53, 54; Halla v. Rogers, 176 Fed. 709, 714, 100 C. C. A. 263.

[9] 5 Pomeroy's Equity Jurisprudence (Equitable Remedies), § 23, and cases collected.

[10] Cunningham v. Independence Consol. Min. Co., 58 Wash. 371, 108 Pac. 956, 959; Lang Syne Min. Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358, 362; Great West Min. Co. v. Woodmas, 14 Colo. 90, 23 Pac. 908, 910; Hall v. Nash, 33 Colo. 500, 81 Pac. 249, 251; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 224, 7 L. R. A., N. S., 791; Gamble v. Hanchett, 34 Nev. 351, 126 Pac. 111, 134 (full citation of authorities, p. 135); Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 592, 23 L. ed. 328, 3 Morr. Min. Rep. 688; Waterman v. Banks, 144 U. S. 394, 403, 12 Sup. Ct. Rep. 646, 36 L. ed. 479; but see Shea v. Nilima, 133 Fed. 209, 214, 66 C. C. A. 263.

[11] Johnston v. Standard Min. Co., 148 U. S. 360, 370, 13 Sup. Ct. Rep. 585, 37 L. ed. 480; Gamble v. Hanchett, 34 Nev. 351, 126 Pac. 111, 134.

raised by the pleadings.[12] The supreme court of the United States has stated the rule trenchantly.[13]

> There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstance, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced.

If the injury is irreparable, insolvency need not be alleged[14] or proved.[15] Whether or not insolvency alone is enough to give equity jurisdiction, where damages would otherwise afford adequate relief, is not settled on the authorities; the prevailing[16] but scarcely

[12] Gamble v. Hanchett, 34 Nev. 351, 126 Pac. 111, 134; Sullivan v. Portland R. R. Co., 94 U. S. 806, 811, 24 L. ed. 324; Willard v. Wood, 164 U. S. 502, 524, 17 Sup. Ct. Rep. 176, 41 L. ed. 531.

[13] Patterson v. Hewitt, 195 U. S. 309, 321, 25 Sup. Ct. Rep. 35, 49 L. ed. 214.

[14] Dingley v. Buckner, 11 Cal. App. 181, 104 Pac. 478, 480; Crescent City Wharf & Lighter Co. v. Simpson, 77 Cal. 286, 19 Pac. 426, 427.

[15] Bettes v. Brower, 184 Fed. 342, 346; Halla v. Rogers, 176 Fed. 709, 714, 100 C. C. A. 263; Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166, 168; City of Bozeman v. Bohart, 42 Mont. 290, 112 Pac. 388, 392; Koch v. Story, 47 Colo. 335, 107 Pac. 1093, 1097; More v. Massini, 32 Cal. 590, 7 Morr. Min. Rep. 455; Merced M. Co. v. Fremont, 7 Cal. 317, 322, 68 Am. Dec. 262, 7 Morr. Min. Rep. 313; Hicks v. Michael, 15 Cal. 107, 116; Leach v. Day, 27 Cal. 643, 646; People v. Morrill, 26 Cal. 330; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; United States Freehold L. & E. Co. v. Gallegos, 89 Fed. 769, 773, 32 C. C. A. 470; 1 Beach on Injunctions, § 35.

[16] 1 High on Injunctions, 4th ed., §§ 18, 717; 2 Joyce on Injunctions (1909), § 1138; Strang v. Richmond P. & C. R. Co., 93 Fed. 71, 74; Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801, 803; Puryear v. Sanford, 124 N. C. 276, 32 S. E. 685.

the sounder,[17] doctrine is that insolvency in itself is not ground for an injunction. The circuit court of appeals for the ninth circuit,[17a] in enforcing a Montana statute[18] enacting that—

> 4. When it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition.

restrained the defendant from removing ore from a part of a vein, the ownership of which part was by adjudication clearly in the defendant, on the ground that the defendant might not have sufficient other property to meet the damages "foreshadowed" in a prior decision for ore wrongfully removed by the defendant from another part of the same vein. This statute, found in several other states,[19] inasmuch as the plaintiff claimed no present interest in the part of the vein covered by the injunction and was not a judgment creditor, affords a special remedy extended to creditors, and is distinct from the ordinary jurisdiction of equity to enjoin.[20]

The injury being irreparable by definition, and going, as it does, to the substance of the estate, it is a matter of indifference whether the plaintiff is in or out of possession;[21] but the trespass must threaten ir-

[17] 5 Pomeroy's Equity Jurisprudence, 3d ed., § 497; Paige v. Akins, 112 Cal. 401, 44 Pac. 666, 670; Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071, 1073; Wilson v. Hill, 46 N. J. Eq. 369, 19 Atl. 1097.

[17a] Montana M. Co. v. St. Louis M. & M. Co., 168 Fed. 514, 518, 93 C. C. A. 536.

[18] Code Civ. Proc. 1895, § 871; Rev. Codes 1907, § 6643.

[19] N. Y. Code Civ. Proc. 1910, § 604 (2); Ind. Rev. Stats. 1881, § 1148.

[20] 2 High on Injunctions, §§ 1402, 1403, 1407.

[21] More v. Massini, 32 Cal. 590, 596; Boyd v. Desrozier, 20 Mont. 444, 52 Pac. 53, 54.

reparable injury and not merely a technical wrong. Sinking shafts or exploring plaintiff's land has been held merely reparable injury.[22]

In cases of an injunction *pendente lite* the granting or withholding of an injunction rests in the discretion of the trial court, whose decision will not be set aside, except for abuse of that discretion.[23] Although a court should not grant an *ex parte* restraining order except in extraordinary cases, especially where it is possible to notify the defendant, such an injunction, too, will not be set aside except for abuse of discretion.[24]

While, as already shown, an injunction ought ordinarily be granted to preserve the property during the pendency of proceedings to determine the rights of the respective parties, still where the plaintiff's right is not sufficiently clear to enable the court to form an opinion upon the preliminary hearing, it sometimes becomes necessary to decide the application upon the consideration of so-called "balance of conveniences." Thus, where it appears that to withhold the writ would probably result in great hardship and irreparable loss

22 King v. Mullins, 27 Mont. 364, 71 Pac. 155, 156; Harley v. Mont. Ore P. Co., 27 Mont. 388, 71 Pac. 407, 408, 22 Morr. Min. Rep. 550; Martin v. Danziger (Cal. App.), 132 Pac. 284, 286.

23 Anaconda C. M. Co. v. Butte & Boston M. Co., 17 Mont. 519, 43 Pac. 924, 925; Heinze v. Boston & Montana Cons. C. & S. M. Co., 20 Mont. 528, 52 Pac. 273, 274; Montana Ore Pur. Co. v. Boston & Montana Cons. C. & S. M. Co., 22 Mont. 159, 56 Pac. 120, 123, 20 Morr. Min. Rep. 1; Heinze v. Boston & M. Consol. Copper & Silver Min. Co., 30 Mont. 484, 77 Pac. 421, 423; Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., 121 Fed. 973, 978, 58 C. C. A. 311, 22 Morr. Min. Rep. 560; Alaska Pac. Ry. & T. Co. v. Copper River & N. W. Ry. Co., 160 Fed. 862, 865, 87 C. C. A. 666; Mont. Min. Co. v. St. Louis Min. & Mill. Co., 168 Fed. 514, 519, 93 C. C. A. 536; Rhodes Min. Co. v. Belleville Placer M. Co., 32 Nev. 230, 106 Pac. 561, 562; rehearing denied, 118 Pac. 813; Wayne v. Alspach, 20 Idaho, 144, 116 Pac. 1033, 1036.

24 Roberts v. Kartzke, 18 Idaho, 552, 111 Pac. 1, 2.

to the complainant, while to grant it would work comparatively slight harm to the defendant, the injunction would ordinarily be granted, and *vice versa*.[25]

If, however, the right of the complainant is clearly established, the injunction should be granted, irrespective of any consideration of the inconveniences which may result therefrom.[26]

Where an interlocutory injunction is awarded a complainant he should not be allowed to do with impunity that which he has restrained the defendant from doing.

> It is a gross abuse of the process of the court for the complainant to disregard his own injunction, having, by means thereof, tied the hands of his adversary.[27]

This is particularly true where the purpose of the injunction is to maintain the property *in statu quo* during the suit; but such an injunction is not binding on the complainant so as to subject him to the summary criminal proceeding for contempt if he violates it. The defendant can either move to have the complainant's injunction dissolved because of the complainant's abuse of the process of the court, or better, petition the court to force the complainant to restore the property, if possible, and enjoin him from any further acts.[28] The supreme court of Montana has

[25] High on Injunctions, 4th ed., § 13, and cases cited; Dimick v. Shaw, 94 Fed. 266, 268, 36 C. C. A. 347; Copper King, Ltd., v. Wabash M. Co., 114 Fed. 991, 992, and cases cited; In re Arkansas Railroad Rates, 168 Fed. 720, 722; Rhodes Min. Co. v. Belleville Placer Min. Co., 32 Nev. 230, 106 Pac. 561, 562; rehearing denied, 118 Pac. 813; Pacific Tel. & Tel. Co. v. City of Los Angeles, 192 Fed. 1009.

[26] High on Injunctions, 4th ed., § 962, and cases cited.

[27] Vanzandt v. Argentine Min. Co., 48 Fed. 770, 771, 2 McCrary, 642, 7 Morr. Min. Rep. 634.

[28] 1 Joyce on Injunctions, § 256a; Vanzandt v. Argentine Min. Co., 48 Fed. 770, 771, 2 McCrary, 642, 7 Morr. Min. Rep. 634; Silver Peak

held,[29] in a confused case, that the defendant's failure to move for a cross-injunction when the complainant's injunction was granted prevents him from subsequently obtaining relief. This ruling seems unfortunate. A defendant ought not be required to anticipate the complainant's violation of the spirit of his own injunction and his abuse of the court's process.

The injunction does not, however, prohibit any party in interest from doing whatever is reasonably necessary for the preservation of the property in controversy;[30] but it may prohibit the removal or treatment of ore previously extracted.[31]

In some of the states the laws governing procedure permit the union of legal and equitable remedies in the same action, "the blending of an action at law with a petition for ancillary relief to the equity side of the court."[32]

So in an action of ejectment or trespass, plaintiff may pray for an injunction *pendente lite,* to restrain the future extraction of ore or the continuance of the trespass.[33]

In the federal and some of the state courts, the application for the preventive relief by injunction is an ancillary proceeding, and requires the institution of a separate equitable action in aid of the action at law.[34]

Mines v. Hanchett, 93 Fed. 76, 77; Mowrer v. State, 107 Ind. 539, 8 N. E. 561, 563; Haight v. Lucia, 36 Wis. 355, 361.

29 Maloney v. King, 30 Mont. 414, 76 Pac. 939, 940.

30 Silver Peak Mines v. Hanchett, 93 Fed. 76, 79, citing Behrens v. McKenzie, 23 Iowa, 333, 341, 92 Am. Dec. 428; Mowrer v. State, 107 Ind. 539, 8 N. E. 561, 563.

31 Waskey v. McNaught, 163 Fed. 929, 936, 90 C. C. A. 289.

32 Natoma W. & M. Co. v. Clarkin, 14 Cal. 544, 548.

33 More v. Massini, 32 Cal. 590, 591; Pfister v. Dascey, 65 Cal. 403, 405, 4 Pac. 393; Hughes v. Dunlap, 91 Cal. 385, 390, 27 Pac. 642, 643; Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140, 141; Waskey v. McNaught, 163 Fed. 929, 931, 90 C. C. A. 289 (under the Alaska Code).

34 Buchanan v. Adkins, 175 Fed. 692, 698, 99 C. C. A. 246.

In a state wherein the union of legal and equitable remedies is permitted, upon removal of the cause to the federal courts, the pleadings must be recast and amended bills filed, one on the law and one on the equity side of the court.[35]

The question of pleadings and practice will therefore depend upon the rules controlling the forum whose jurisdiction is invoked. These are subjects foreign to this treatise.

**§ 873. Inspection and survey.**—We have no concern with the various state and territorial statutes which provide for the periodical inspection of mines by officials appointed for that purpose. These are in the nature of police regulations, and have for their principal object the protection of miners who are engaged in underground work.[36]

In all mining litigation, particularly in actions wherein underground trespasses are alleged, and the ownership, situation and value of ore bodies in dispute are necessarily involved, the subject of inspection and survey for the purpose of disclosing the facts is of the greatest importance, not only to the litigants, but to enable the court to apply the law.

Some of the states have special statutes upon the subject, more or less comprehensive, all, however, based upon the same underlying principles. Ordinarily, under these statutes, the pendency of an action

[35] Hurt v. Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Perkins v. Hendryx, 23 Fed. 418; Northern Pacific R. R. v. Paine, 119 U. S. 561, 7 Sup. Ct. Rep. 323, 30 L. ed. 513; Stockton v. Oregon Short Line R. Co., 170 Fed. 627, 633.

[36] A reference to these statutes in the older states will be found in the notes to § 19, *ante*. In the Appendix, where the legislation of each of the precious metal bearing states of the west is given, there will also be found a reference to cognate legislation.

is necessary to enable a party to enter upon and underneath the lands in possession of others, and the proceedings necessary to obtain an order of the court to inspect, sample and survey are defined, with more or less particularity.[37]

In Montana the law[38] authorizes an inspection and survey without suit, "whenever any person shall have any right to, or interest in, any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement or protection of such right," giving the district court or judge thereof power, upon investigating

[37] California, Code Civ. Proc., §§ 742, 743; Colorado, Mills' Annot. Stats., §§ 3164, 3176; Rev. Stats. 1908, § 4218; Code Civ. Proc., § 398; People ex rel. Calumet G. M. & M. Co. v. De France, 29 Colo. 309, 68 Pac. 267, 268, 22 Morr. Min. Rep. 61; Smuggler-Union Min. Co. v. Kent, 47 Colo. 320, 112 Pac. 223, 224; Nevada, Comp. Laws 1900, §§ 250–252; New Mexico, Laws 1887, p. 206; Comp. Laws 1897, §§ 2293–2297; North Dakota, Rev. Code 1899, § 1442; Rev. Code 1905, § 1816; South Dakota, Rev. Stats. Dak., p. 95 (see Comp. Laws Dak. 1887, § 2014; Grantham's Annot. Stats. of S. D. 1899, § 2672); Rev. Pol. Code 1903, § 2548; Utah, Rev. Stats. 1898, §§ 3515, 3516; Comp. Laws 1907, §§ 3515, 3516.

It seems that formerly the jurisdiction of a court of equity to order an inspection existed only where a suit was pending. Montana Co. v. St. Louis M. Co., 152 U. S. 160, 169, 14 Sup. Ct. Rep. 506, 38 L. ed. 398; National Mines Co. v. Sixth Jud. Dist., 34 Nev. 67, 116 Pac. 996, 998, 1 Water & Min. Cas. 169. A statute allowing inspection before any suit is begun has been held constitutional. Montana Co. v. St. Louis M. Co., *supra*. The only two states which have statutes allowing inspection before suit are Montana and Kansas; the Nevada statute is ambiguous, but the supreme court of Nevada has held that the institution of a suit is necessary. Montana, Rev. Code Civ. Proc., § 1317; Rev. Codes 1907, §§ 6874–6876. See St. Louis M. & M. Co. v. Montana Co., 9 Mont. 288, 23 Pac. 510, 512, 17 Morr. Min. Rep. 283. *Kansas*, Laws 1877, c. 127; In re Carr, 52 Kan. 688, 35 Pac. 818, 819. *Nevada*, Comp. Laws 1900, § 252; Rev. Laws 1912, § 5511; National Mines Co. v. Sixth Dist. Court, 34 Nev. 67, 116 Pac. 996, 998, 1 Water & Min. Cas. 169.

[38] Rev. Code Civ. Proc., § 1317; Rev. Codes 1907, §§ 6874–6876.

the facts, to issue the necessary order. The constitutionality of this class of legislation has been upheld.[39]

The supreme court of Montana has said of this law:—

> The purpose of the statute is to serve the interest of justice, however, and not to be made an instrument of injustice and oppression. Under it the court may not, without a reasonable showing, and in disregard of the rights of the party in possession of the property or in control of the means of access to it, permit his adversary to enter upon it, merely because he desires and asks for an order permitting him to do so.[40]

Similar legislation is found in other states;[41] but independent of any state legislation, as an aid to discovery in pending actions, the power to order an inspection of real property has long existed in the courts of equity.[42]

As was said by Judge Baldwin, sitting as circuit judge in the ninth circuit,[43]—

[39] St. Louis M. & M. Co. v. Montana Co., 9 Mont. 288, 23 Pac. 510, 512, 17 Morr. Min. Rep. 283; affirmed on writ of error, Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, 165, 14 Sup. Ct. Rep. 506, 38 L. ed. 398; In re Carr, 52 Kan. 688, 35 Pac. 818.

The statutes of Montana (Rev. Codes 1907, § 6876) provide that the costs must be paid by the petitioner. The supreme court of Montana has uniformly enforced the statute, and has held that the trial court cannot fix an arbitrary sum, but must take evidence as to the cost involved. State v. District Court, 30 Mont. 206, 76 Pac. 206, 210; State v. District Court, 28 Mont. 528, 73 Pac. 230, 235.

[40] State v. District Court, 25 Mont. 504, 65 Pac. 1020.

[41] Idaho, Rev. Stats. 1887, § 4542; Code Civ. Proc. 1901, §§ 3383, 3384; Rev. Codes 1907, §§ 4542, 4543; Kansas, Laws 1877, c. 127; In re Carr, 52 Kan. 688, 35 Pac. 818.

[42] Bacon v. Federal M. & S. Co., 19 Idaho, 136, 112 Pac. 1055, 1057; National Mines Co. v. District Court, 34 Nev. 67, 116 Pac. 996, 999, 1 Water & Min. Cas. 169.

[43] Thornburgh v. Savage M. Co., Fed. Cas. No. 13,986, 7 Morr. Min. Rep. 667, 680.

> Ought a court of equity in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmation of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. . . . . It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts? And can it refuse to learn the facts?[44]

Under an Idaho statute[45] allowing "any person having a *bona fide* claim to . . . . or interest in any . . . . mining claim" to inspect the property, it has been held that a judgment creditor who has levied execution on the debtor's claim and is likely to be the only bidder at the execution sale does not have a sufficient interest to entitle him to an order for an inspection.[46]

Though the petitioner must make a sufficient showing of the need of inspection and his rights thereto, it does not follow that to get an order from the court he must prove all the allegations of his complaint. Such a ruling would force the petitioner to introduce the very evidence he hopes to obtain by an inspection.[47] The supreme court of Montana has compared an order

[44] Quoted in Montana Co. v. St. Louis M. & M. Co., 152 U. S. 160, 166, 14 Sup. Ct. Rep. 506, 38 L. ed. 398.

[45] Idaho Rev. Codes 1908, § 4542.

[46] Bacon v. Federal M. & S. Co., 19 Idaho, 136, 112 Pac. 1055, 1056.

[47] State v. District Court, 28 Mont. 528, 73 Pac. 230, 234; State ex rel. Geyman v. District Court, 26 Mont. 483, 68 Pac. 861, 862; State v. District Court, 30 Mont. 206, 76 Pac. 206, 208.

for an inspection to a search-warrant to obtain evidence;[48] the petitioner need only show that an inspection will be likely to aid the parties to present their case. Where an inspection is ordered, the adverse party cannot prevent the court from carrying out its mandate by refusing to allow the petitioner ingress and egress by the use of his appliances and machinery. Such a right in the defendant would nullify the court's mandate; and so an order of the court requiring the defendant to allow the petitioner to use his machinery and appliances is constitutional.[49] The petitioner's right is subject to reasonable restrictions. Although he is not limited in his inspection to the openings made upon the lode in controversy and may inspect adjacent openings and tunnels,[50] yet he cannot inspect those parts of the defendant's mines not involved in the present suit.[51] Nor can he enter through the defendant's shaft and use the defendant's machinery when he can enter through his own shaft.[52] The courts have even gone so far as to allow the petitioner in the course of his inspection to do development work, in order to trace the lode.[53] The granting of an order for inspection lies in the discretion of the court, and cannot be set aside except where the trial court has abused its

[48] State v. District Court, 26 Mont. 483, 68 Pac. 861, 863.

[49] State v. District Court, 28 Mont. 528, 73 Pac. 230, 237; State v. District Court, 30 Mont. 206, 76 Pac. 206, 210; State ex rel. Heinze v. District Court, 29 Mont. 105, 74 Pac. 132, 134.

[50] State v. District Court, 28 Mont. 528, 73 Pac. 230, 235.

[51] State ex rel. Geyman v. District Court, 26 Mont. 483, 68 Pac. 861, 863; State v. District Court, 30 Mont. 206, 76 Pac. 206, 210; Smuggler-Union M. Co. v. Kent, 47 Colo. 320, 112 Pac. 223, 224.

[52] State v. District Court, 28 Mont. 528, 73 Pac. 230, 235.

[53] Montana Min. Co. v. St. Louis Min. & Mill. Co., 168 Fed. 514, 518, 93 C. C. A. 536.

discretion;[54] in the federal courts it is not appealable.[55] Where the lower court is in doubt as to its power to grant an order for an inspection, it cannot rule that unless the defendant allows the plaintiff to inspect, he cannot introduce evidence as to the condition of the part of the mine involved unless the plaintiff does so first.[56] And where the condition of a mine owned by one of the parties, but not involved in the suit, is relevant and admissible in evidence, the party owning the mine, unless he gives his adversary a fair opportunity to inspect the mine, cannot introduce any evidence as to those conditions.[57] It seems that this same ruling would apply even in the case of a mine owned by a third party. Unless both parties are allowed to inspect the property neither can introduce evidence as to its condition.

The equitable jurisdiction to order such inspection and survey is well recognized in England.[58]

As to the terms under which orders for such inspection are given under the existing English rules, Mr. MacSwinney says that the applicant will usually be required to submit to the following:—

> He will usually be required to give a reasonable notice in writing, stating the time at which he proposes that the inspection shall take place, and then names a description of the persons whom he pro-

[54] State v. District Court, 29 Mont. 105, 74 Pac. 132, 133.

[55] Montana Ore P. Co. v. Butte & Boston Con. Min. Co., 126 Fed. 168, 61 C. C. A. 426.

[56] Smuggler-Union Min. Co. v. Kent, 47 Colo. 320, 112 Pac. 223, 225.

[57] Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 109, 112.

[58] Bainbridge on Mines, 4th ed., pp. 315, 317; MacSwinney on Mines, p. 540; Lonsdale v. Curwen, 3 Bligh, 168, 7 Morr. Min. Rep. 693; Walker v. Fletcher, 3 Bligh, 172, 8 Morr. Min. Rep. 1; Blakesley v. Wheeldon, 1 Hare, 176, 8 Morr. Min. Rep. 8; Lewis v. Marsh, 8 Hare, 97; Bennett v. Whitehouse, 28 Beav. 119, 8 Morr. Min. Rep. 17; Bennett v. Griffiths, 30 L. J. Q. B. 98, 8 Morr. Min. Rep. 21; Whaley v. Braucker, 10 L. T., N. S., 155, 8 Morr. Min. Rep. 29.

poses as his agents for that purpose. He will not be allowed to appoint agents to whom his neighbor may reasonably object. He will not be allowed to inspect, except for the purpose of ascertaining the fact of the encroachment. His neighbors will usually be allowed to attend the inspection. The obstructions which he may remove will usually be confined to such matters as rubbish, framed dams, and barriers, and recently erected walls, and then only when the removal can take place without danger to life and health; and (irrespective of life or health) he will not be allowed to do unnecessary damage to his neighbor's property or operations. He will usually have to make good all damage which his neighbor may sustain; and he may be obliged to give security that he will do so, and he will usually have to bear all the costs of the inspection.[59]

In America the right of the courts to grant the privilege of inspection and survey in proper cases is well settled.[60]

The privilege of sampling within reasonable limits is also allowed, where the value of ore is a fact to be determined. Whether or not the cost of the inspection and survey will be allowed the party in the event of his success in the litigation depends upon the law of the particular state or territory. Costs are matters of statutory regulation, and no general rule may be laid down.

[59] MacSwinney on Mines, pp. 541, 542. See, also, Stewart on Mines, p. 255.

[60] St. Louis M. & M. Co. v. Montana Co., 152 U. S. 160, 14 Sup. Ct. Rep. 506, 38 L. ed. 398; St. Louis M. & M. Co. v. Montana Co., 9 Mont. 288, 23 Pac. 510, 17 Morr. Min. Rep. 283; Duggan v. Davey, 4 Dak. 110, 128, 26 N. W. 887, 17 Morr. Min. Rep. 59; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 6 Morr. Min. Rep. 317; Thomas v. Allentown M. Co., 28 N. J. Eq. 77, 8 Morr. Min. Rep. 36; Bluebird M. Co. v. Murray, 9 Mont. 468, 23 Pac. 1022.

The extent to which the courts may grant the privilege of inspection and survey, the territorial limits within which it shall be confined, and other matters of detail, will depend upon the nature of the issues. The discretion of the court in this behalf must, of course, be reasonably exercised. The right has become so well recognized by the profession that reciprocal privileges are usually granted by stipulation.

# TITLE XI-A.

# THE MINING INDUSTRY AND LAWS OF THE INSULAR POSSESSIONS OF THE UNITED STATES.

CHAPTER

I. INSULAR POSSESSIONS OF THE UNITED STATES. (2203)

# CHAPTER I.

## INSULAR POSSESSIONS OF THE UNITED STATES.

§ 876. Introductory.
§ 877. Hawaii.
§ 878. Porto Rico.
§ 879. Philippine Islands.

**§ 876. Introductory.**—The treaties under which the United States succeeded to the municipal sovereignty of Hawaii, Porto Rico, and the Philippine Islands conveyed to the United States all lands which were then held by the respective ceding powers which fell within the category of "crown lands," or "national domain,"—that is, such lands as had not passed into private ownership by grants from the former sovereign. These lands therefore became the property of the United States by the terms of annexation or cession, and as such may be disposed of only under the direction of congress.[1]

None of the public land laws of the United States is by mere force of the territorial acquisition extended over the newly acquired territory, and until the will of the national legislature finds expression in congressional enactment, all lands which are subject to classification as "public" are necessarily in a state of reservation. The extension of federal laws over ceded territory has always been gradual. Different conditions exist in different localities. An economic or governmental policy which might be wise and prudent in a district such as Alaska, with a sparse population and practically no organized municipal government, might not, and, as we know, would not, be suited to the Philippine Islands—a conquered country, with a dense population, and having at the time of its cession an

[1] Opinion Attorney-General, 29 L. D. 32.

organized government framed on theories altogether different from that in force in the United States. Therefore, it became necessary to deal with each cession separately. It is not our purpose to make an extended analysis of the legal systems in force in any of the newly acquired possessions prior to the treaties of cession. Our object in the main is to briefly indicate the present *status* of the ceded lands, looking to their ultimate disposal. Necessarily time will be required to determine the exact *status* of these lands, and it is probable that some of the present legislation will undergo radical changes before we shall have in the insular possessions a stable or permanent public land system.

§ 877. **Hawaii.**—The joint resolution providing for the annexation of the Hawaiian Islands, approved July 7, 1898, contains the following:—

> The existing laws of the United States relative to the public lands shall not apply to such lands in the Hawaiian Islands; but the congress of the United States shall enact special laws for their management and disposition.

The act of congress of April 30, 1900,[2] to provide a government for the territory of Hawaii, declared that the laws of Hawaii relating to public lands, except as changed by that act, should remain in force until congress should otherwise provide. Additional changes in such laws were made in the amendatory act of congress of May 27, 1910.[3] The changes made by these acts were few and in no sense important so far as our present purposes are concerned. There is therefore no existing federal legislation on the subject of mineral

[2] 31 Stats. at Large, p. 141.

[3] 36 Stats. at Large, 444.

lands operative in the territory. Nor is there any reference in the Hawaiian laws to this class of lands. As a matter of fact, in a broad economic sense, these islands do not contain, so far as known, mineral deposits. Mr. David T. Day, in an interesting monograph on this subject,[4] points out that, owing to the comparatively recent volcanic origin of the islands, the only substances which might fall within the designation of "mineral" in its comprehensive sense are secondary decomposition products, and in mineral resources "the Hawaiian Islands are essentially poor." He mentions kaolin of fine quality, sulphur, gypsum, and building-stone, also pumice-stone, and expressed the view that some of these deposits may be of possible value for export, and that more of them will be of utility in the local industries. Whatever the future may develop with regard to the mineral deposits of these islands, necessitating some special provisions as to their acquisition when found on the public domain, it is quite manifest that such provisions will necessarily be local in character and administered through the territorial government.

§ 878. **Porto Rico.**—The island of Porto Rico is supposed to contain mineral deposits of more or less economic value, and at times under the Spanish rule there have been produced gold, silver, lead, platinum, and copper ores; also salt, calcareous phosphate and iron.

But by act of congress, July 1, 1902,[5] all public lands passing to the United States have been ceded to the government of Porto Rico, to be held and disposed of

[4] "Mineral Resources of the Antilles, Hawaii, and Philippines," Eng. Mag., vol. xvii, p. 242 (May, 1899).

[5] Stats. 1st Sess. 57 Cong., p. 731.

for the use and benefit of the people of the island. So far as we are advised, there is as yet no territorial legislation concerning the acquisition of mining rights in the public lands in this territory. Obviously the federal mining laws have no application there.

§ 879. **Philippine Islands.**—At the time of the cession by Spain to the United States of the Philippine Islands, there was in existence and operation a comprehensive code of laws emanating from the Spanish government. The archipelago is known to be rich in a variety of valuable mineral deposits, and the area of the public domain ceded to the United States is undoubtedly very large. The attention of congress was early directed by the Philippine Commission to the pressing need of some legislation on the subject of mining lands and the mining industry within the archipelago. The act passed by congress and approved July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of the civil government in the Philippine Islands and for other purposes,"[6] embodied a mining code which, as amended by an act of congress of February 6, 1905,[7] substituting meters for feet, is printed in full in the Appendix.

While the act in some respects follows the theories of the general federal law, in others it is widely different. It permits no extralateral right on lode locations, allowing a locator to take one thousand meters square and confining him within his vertical boundaries. In this respect the law is practically copied from the British Columbia statute. It provides for the marking of the location line, requires discovery of mineral in place, and a record to be made of the claim. It pre-

[6] 32 Stats. at Large, 691.
[7] 33 Stats. at Large, 692.

vents the holder from holding in his, its or their own name or in the name of any other person or corporation or association more than one mineral claim on one vein.[8]

The United States Philippine Commission or its successors are authorized to make regulations not in conflict with the act, governing the location, manner of recording and amount of work necessary to hold possession.

The provisions of the federal mining laws as to annual work, forfeiture to co-owners, and resumption of work to prevent forfeiture, applications for patent, filing and prosecution of adverse claims, with the substitution of certain Philippine officials and tribunals instead of those performing like functions under the continental law, are embodied in the Philippine act. The unit of a placer location is eight hectares (approximately twenty acres), with a limitation of sixty-four hectares for eight persons. The incorporation into the act under consideration of those provisions which follow the lines of the federal mining laws necessarily carries the rules of interpretation applied by the courts to those laws.

A comparison of the provisions of the two laws will readily disclose the differences and similarities between them.

[8] This provision practically prevents consolidation. Its unwisdom is apparent, and the Philippine Commission has recommended its repeal.

# APPENDIX—MISCELLANEOUS.

(2211)

# TITLE XII.

# FEDERAL STATUTES RELATING TO MINES, TOGETHER WITH LAND DEPARTMENT REGULATIONS.

[The section references in the foot-notes are to the text of the treatise unless otherwise specified.]


I. Lode and Water Law of July 26, 1866.

II. Placer Law of July 9, 1870.

III. General Mining Act of May 10, 1872.

IV. Title XXXII, Chapter 6, of the United States Revised Statutes Embodying Existing Laws Relating to Mineral Lands.

V. The Withdrawal Acts.

VI. Mining Legislation for the Philippine Islands.

VII. Land Department Regulations upon Subject of Mineral Lands Other Than Coal.

VIII. Coal Land Law With Regulations Thereunder.

IX. Instructions Relating to Selection of Lands by Railroads and States.

X. Petroleum Law of February 11, 1897, and Circular Instructions Relating Thereto.

XI. Alien Act of March 2, 1897.

XII. Recent Legislation and Regulations on the Subject of Mining Claims Within Forest Reservations.

XIII. Legislation Concerning the Cutting of Timber on Public Mineral Lands.


See, also, Mine Inspectors' Law, March 3, 1891 (26 Stats. at Large, p. 1104).

## I. LODE AND WATER LAW OF JULY 26, 1866.

For a history of the passage of this act, its essential features, its construction by the land department and the courts, see §§ 53–60.

For an analysis of the changes made by the act of May 10, 1872, see §§ 68–74.

Its place in the present system as a muniment of existing titles: § 564.

The extralateral right under the act: §§ 567, 572–577a.

Sections one, two, three, four and six repealed (act of May 10, 1872, § 9), but repeal not to affect existing rights: Id., §§ 9, 16. See, also, Rev. Stats., § 2344.

*An act granting the right of way to ditch and canal owners over the public lands and for other purposes.*

14 Stats. at Large, ch. 262, p. 251.

**Who may locate—What laws govern.**

Be it enacted: § 1. That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

Repealed by act of May 10, 1872: § 9.

**Entry and patent—Extralateral right.**

§ 2. And be it further enacted, that whenever any person, or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any

depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

Repealed by act of May 10, 1872: § 9.

**Patent proceedings.**

§ 3. And be it further enacted, that upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

Repealed by act of May 10, 1872: § 9.

**Surveys—Length of claim—Number of claims to each locator—Extralateral right—Surface to accompany lode.**

§ 4. And be it further enacted, that when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid; and the surveyor-general may, in extending the surveys, vary

the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners; provided, that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules; and provided further, that no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

Repealed by act of May 10, 1872: § 9.

**States may supply legislation regulating the working of mines.**

§ 5. And be it further enacted, that as a further condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Preserved in Rev. Stats., § 2338.

**Adverse claim—Stay of proceedings.**

§ 6. And be it further enacted, that whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases.

Repealed by act of May 10, 1872: § 9.

**President empowered to establish land districts.**

§ 7. And be it further enacted, that the president of the United States be, and is hereby, authorized to establish additional land districts, and to appoint the necessary officers

under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

Preserved in Rev. Stats., § 2343, q. v.

**Rights of way over public lands.**

§ 8. And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Preserved in Rev. Stats., § 2477, q. v.

**Prior appropriators of water rights protected—Rights of way for ditches, etc.**

§ 9. And be it further enacted, that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing and other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Preserved in Rev. Stats., § 2339, q. v.

**Homesteads upon mineral lands.**

§ 10. And be it further enacted, that wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or cop-

per discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or said parties may avail themselves of the provisions of the act of congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

Substantially preserved in Rev. Stats., § 2341, q. v.

**Secretary of interior may set apart agricultural lands.**

§ 11. And be it further enacted, that upon the survey of the lands aforesaid, the secretary of the interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

Preserved in Rev. Stats., § 2342.

## II. PLACER LAW OF JULY 9, 1870.

For discussion of this act, see text, § 62.
Local rules and customs after the passage of this act: § 63.
Changes made by the act of 1872: § 72.
Form and extent of locations under this act: § 447.

*An act to amend "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes."*

16 Stats. at Large, ch. 235, p. 217.

**Act of 1866 amended.**

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the act granting the right of way to ditch and canal owners, over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same

is hereby amended, by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act.

**Placers subject to entry—Size of claim—Group claims.**

§ 12. And be it further enacted, that claims usually called "placers," including all forms of deposit,[1] excepting veins of quartz, or other rock in place, shall be subject to entry[2] and patent[3] under this act, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims; provided, that where the lands have been previously surveyed by the United States, the entry, in its exterior limits, shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required,[4] and the lands may be paid for at the rate of two dollars and fifty cents per acre; provided, further, that legal subdivisions of forty acres may be subdivided into ten acre tracts;[5] and that two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof;[6] and provided further, that no location of a placer claim hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

See §§ 2329–2331, Rev. Stats.

1 What substances may be located under placer laws: §§ 419–428.

2 Location and its requirements: §§ 432, 433.

Discovery: § 437.

Marking on the ground: §§ 454, 455.

Location certificate: § 459.

3 Proceedings to obtain patent to lode claims generally applicable to placers: § 699.

Proof of expenditure: § 701.

Proof of mineral character of land and that no known lodes exist within limits of the claim: §§ 702, 703.

Surveyor-general's certificate as to expenditures: § 673.

[4] Description of placer claims upon surveyed lands: § 700.

Surveyor of placer claims: § 672.

[5] Form and extent of placer locations prior to Rev. Stats.: § 447.

Form and extent under Rev. Stats.: § 448.

[6] Placer locations by corporations: § 449.

Locations by several persons in the interest of one: § 450.

Number of locations by an individual: § 450.

**When patent may be obtained—Proofs.**

§ 13. And be it further enacted, that where said persons or associations, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim; provided, however, that nothing in this act shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

See § 2332, Rev. Stats.

**Verification of affidavits.**

§ 14. And be it further enacted, that all *ex parte* affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated.

Preserved in Rev. Stats., § 2335.

**Fees.**

§ 15. And be it further enacted, that registers and receivers shall receive the same fees for services under this act as are provided by law for like services under other acts of congress; and that effect shall be given to the foregoing act

according to such regulations as may be prescribed by the commissioner of the general land office.

Fees of registers and receivers: Rev. Stats., § 2238.

**Public surveys extended.**

§ 16. And be it further enacted, that so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands of California, the granting of pre-emption rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands; provided, that all subdividing of the surveyed lands into lots of less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants; and provided further, that nothing herein contained shall require the survey of waste or useless land.

**Easements for water rights.**

§ 17. And be it further enacted, that none of the rights conferred by sections five, eight, and nine of the act of which this is amendatory shall be abrogated by this act; and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

See Rev. Stats., §§ 2340, 2344.

## III. GENERAL MINING ACT OF MAY 10, 1872.

For a history of the passage of this act, see §§ 68, 69.

For a discussion of the changes made in the then existing law by this act, see text, §§ 70–72.

For a statement of the new provisions embodied in this act, not contained in previous acts, see § 73.

Extralateral rights under this act: §§ 581–594.

*An act to promote the development of the mining resources of the United States.*

17 Stats. at Large, ch. 152, p. 91.

**Valuable mineral deposits open to location—Who may locate.**

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, § 1. That all valuable mineral deposits[1] in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such,[2] under regulations prescribed by law,[3] and according to the local customs or rules of miners,[4] in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States.

Preserved in Rev. Stats., § 2319.

[1] The metallic or nonmetallic character of deposits occurring in veins as affecting the right of appropriation: § 323.

Character of deposits subject to appropriation under placer laws: §§ 419–428.

[2] Only citizens may locate, or those who have declared their intention to become such: § 223.

Who are citizens: §§ 224–226.

Citizenship, how proved: § 227.

Acquisition of title to unpatented claims by aliens: §§ 231–234.

Effect of naturalizing alien after he has located his claim: § 232.

Rights of aliens in the states: §§ 237–238.

General property rights of aliens in the territories: §§ 242–244.

[3] Limits within which state may legislate: §§ 249, 250.

Subjects upon which states have enacted laws the validity of which is open to question: § 251.

[4] Permissive scope of local regulations: § 270.
Penalty for noncompliance with district rules: § 274.
Subject of district rules generally: §§ 268–275.

**Length of lode claim—Discovery essential to location—Width of claim—End-lines must be parallel.**

§ 2. That mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed, as to length along the vein or lode, by the customs regulations, and laws in force at the date of their location. A mining claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode;[5] but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.[6] No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited, by any mining regulation, to less than twenty-five feet on each side of the middle of the vein at the surface,[7] except where adverse rights existing at the passage of this act shall render such limitation necessary. The end-lines of each claim shall be parallel to each other.[8]

Preserved in Rev. Stats., § 2320.

[5] Length of lode claim: § 361.
Surface conflicts with prior locations: § 363.
[6] Discovery as the source of miner's title: § 335.
What constitutes a valid discovery: § 336.
Where discovery must be made: § 337.
Effect of loss of discovery upon remainder of location: § 338.
Extent of locator's rights after discovery and prior to completion of location: § 339.
Surface must include apex: § 364.
[7] Width of the lode claims: § 361.
[8] End-lines must be parallel: §§ 367, 582.
Side-end lines: § 367.

**Extralateral and intralimital rights.**

§ 3. That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral, vein,

lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States and the state, territorial, and local regulations, not in conflict with said laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of said surface locations; provided, that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges. And provided further, that nothing in this section shall authorize the locator or possessor of a vein or lode which extends, in its downward course, beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another.

Preserved in Rev. Stats., § 2322.

The "dip right" under local rules: § 566.

The right to pursue the vein in depth prior to patent, under act of 1866: § 567.

Nature of estate in the vein created by grant of "dip right": § 567.

Extralateral rights on the original lode under patents issued prior to May 10, 1872: §§ 572–574.

Parallelism of end-lines not required under act of 1866 but required by act of 1872: §§ 576, 582.

Extralateral rights in locations made under act of 1872: §§ 581–594.

"Broad lodes": § 583.

Vein entering and departing through same side-line: § 584.

Vein crossing two parallel side-lines: §§ 586–589.

Vein crossing two opposite nonparallel side-lines: § 590.

Vein crossing one end-line and a side-line: § 591.

Vein with apex wholly within location but crossing no boundary: § 592.

Extralateral rights as to veins other than the one upon which the location is based: § 593.

Extralateral rights conferred by act of 1872 on locators of other lodes located before 1872: §§ 598–600.

Legal obstacles interrupting extralateral rights: §§ 608–615.

Union of veins on the dip: § 614.

Cross-lodes: §§ 557–560.

Intralimital rights: §§ 548–553.

**Tunnel rights—Length of tunnels.**

§ 4. That where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the lines of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel.

Preserved in Rev. Stats., § 2323.

Tunnel locations prior to the enactment of federal laws: § 467.

Acts to be performed in acquiring tunnel rights: § 472.

"Line" and "face" of tunnel defined: §§ 473, 474.

Marking of tunnel location on the ground: § 475.

Length upon discovered lode awarded to tunnel owner by above section: § 481.

Necessity for appropriation of discovered lode by surface location: § 482. See note to § 2323, Rev. Stats.

To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others? §§ 483–491. See note to § 2323, Rev. Stats., *post*.

**Local rules made by miners—Marking boundaries—Records—Annual labor—Forfeiture—Resumption of work—Forfeiture to co-owners.**

§ 5. That the miners of each mining district may make rules and regulations not in conflict with the laws of the

United States. or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor;[9] but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required by this act, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion to comply with this act, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

[9] Amended March 3, 1873, so that the time for the first annual expenditure on claims located prior to the passage of the act of May 10, 1872, should be extended to June 10, 1875. Again amended June 6, 1874, so that the time for such expenditure on this class of claims should be extended to January 1, 1875: 18 Stats. at Large, 61.

See Rev. Stats., § 2324.

Local rules and regulations: §§ 268–275.

What is sufficient marking under federal law: § 373; under state statutes: § 374.

Location certificate and record: §§ 379–392.

Annual labor: §§ 623–638.

Requirement as to annual labor imperative: § 624.

Work done within the limits of a group of claims: § 630.

Failure to perform labor renders claim open to relocation: §§ 642–645.

Forfeiture to co-owners: § 646.

Resumption of work: §§ 651–654.

**Patent proceedings.**

§ 6. That a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this act, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this act, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted as aforesaid, and shall file a copy of said notice in such land office, and shall thereupon be entitled to a patent for said land in the manner following: The register of the land office, upon the filing of such application, plat, and field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a news-

paper to be by him designated as published nearest to said claim, and he shall also post such notice in his office for the same period. The claimant, at the time of filing his application, or at any time thereafter within sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during said period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act.

Preserved in Rev. Stats., § 2325.

Survey for patent: §§ 670–673.
The survey of lodes: § 671. For placers: § 672.
Posting of notice and copy of plat: § 677.
Initiatory proceedings: § 678.
Land embraced within the claim must be clear on tract-books: § 679.
Application: § 681.
Verification of application: § 682.
Proofs: §§ 683–692.
Application to purchase: § 694. Patents for placers: §§ 699–704.
For forms used in patent proceedings, see *post*, "Forms."

**Adverse claim, how filed and adjudicated—Proof of citizenship.**

§ 7. That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, bound-

aries, and extent of such adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended, or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it shall appear from the decision of the court, that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Proof of citizenship under this act, or the acts of July twenty-sixth, eighteen hundred and sixty-six, and July ninth, eighteen hundred and seventy, in the case of an individual, may consist of his own affidavit thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief,

and in case of a corporation organized under the laws of the United States, or of any state or territory of the United States, by the filing of a certified copy of their charter or certificate of incorporation; and nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever.

See Rev. Stats., §§ 2321, 2326.

Adverse claims: §§ 712–766.
What courts have jurisdiction: §§ 746–750.
Is a suit involving an adverse claim legal or equitable in its nature? § 754.
Form of judgment: § 763.
Effect of judgment: § 765.
Citizenship, how proved: § 227.
See note to § 2326, Rev. Stats.

**Description of claim on surveyed and unsurveyed land.**

§ 8. That the description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued as aforesaid for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

See Rev. Stats., § 2327.

**Patents for claims located prior to 1872, but patented subsequently—Rights under patents issued before act of 1872.**

§ 9. That sections one, two, three, four, and six of an act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the general land

office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining claims heretofore issued under the act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.

See Rev. Stats., § 2328.

Extralateral rights on the original lode under patents issued prior to May 10, 1872: §§ 572–577.

Extralateral rights on other lodes conferred by act of 1872 on owners of claims previously located: §§ 598–600.

Construction of patents applied for prior but issued subsequent to act of 1866: § 604.

**Placer patents—Act of 1870 amended—Homesteads.**

§ 10. That the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims; but where said placer claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims hereafter located shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant, but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; provided, that proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases; and, provided also, that where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, said fractional

portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

See Rev. Stats., § 2331.

Patents for placers: §§ 699–704.
Description of placers upon surveyed lands: § 700.
Proof of expenditures: § 701.
Proof of mineral character: § 702.
Proof that no known lodes exist within limits of placer claim: § 703.

**Patents for lodes within placers.**

§ 11. That where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case (subject to the provisions of this act and the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy) a patent shall issue for the placer claim, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in the second section of this act, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or a lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

See Rev. Stats., § 2333.
Patents for lodes within placers: § 704.

**Deputy mineral surveyors—Expenses of patent—Notices, where published—Designation of newspaper—Fees of officers.**

§ 12. That the surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this act; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by said applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office. The fees of the register and the receiver shall be five dollars each for filing and acting upon each application for patent or adverse claim filed and they shall be allowed the amount fixed by law for reducing testimony to writing, when done in the land office, such fees and allowances to be paid by the respective parties; and no other fees shall be charged by them in such cases. Nothing in this act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled "An act granting the right of way to ditch and canal owners over the

public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, nor shall this act affect any right acquired under said act; and nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

See Rev. Stats., §§ 2334, 2338, 2344.

Surveyors-general and deputies: § 659.
Statement of fees and charges: § 693.

**Affidavits, before whom to be made.**

§ 13. That all affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided, on personal notice of at least ten days to the opposing party; or if said party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

See Rev. Stats., § 2335.

**Cross-lodes, uniting veins.**

§ 14. That where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; provided, however, that the subsequent location shall have the right of way through said space of

intersection for the purposes of convenient working of the said mine; and provided, also, that where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Preserved in Rev. Stats., § 2336.

Cross-lodes: §§ 557–560.
Union of veins on dip: § 614.

**Millsites, patents for.**

§ 15. That where nonmineral land, not contiguous to the vein or lode, is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable under this act to veins or lodes; provided, that no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode. The owner of a quartz-mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his millsite as provided in this section.

See Rev. Stats., § 2337.

Millsites: §§ 519–524, 708.
Location of millsite with reference to lode: § 522.
Nature of use required in case of location by lode proprietor: § 523.
Right to millsite, how initiated: § 521.
Millsite used for quartz-mill or reduction works disconnected with lode ownership: § 524.

**Repealing clauses.**

§ 16. That all acts and parts of acts inconsistent herewith are hereby repealed; provided, that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws.

See Rev. Stats., § 5596.

## IV. TITLE XXXII, CHAPTER 6, OF UNITED STATES REVISED STATUTES, EMBODYING EXISTING LAWS RELATING TO MINERAL LANDS.

**Reservation of mineral lands from sale under general laws.**

§ 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

General policy of government as to reservation of mineral lands: § 47.
Terms of reservation used in various grants: § 86.
Reservation of mineral lands in grants to states: §§ 136–139, 140.
Reservation in Mexican grants under act of 1891: § 127.
Reservation in railroad grants: §§ 152, 154, 155.

**Mineral deposits open to location—Who may locate.**

§ 2319. All valuable mineral deposits[1] in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such,[2] under regulations prescribed by law,[3] and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.[4]

[1] The metallic or nonmetallic character of deposits occurring in veins as affecting the right of appropriation: § 323.
Character of deposits subject to appropriation under placer laws: §§ 419–428.

[2] Only citizens or those who have declared their intention to become such may locate: § 223.
Who are citizens: §§ 224–226.
Citizenship, how proved: § 227.
Acquisition of title to unpatented claims by aliens: §§ 231–234.
Effect upon location of naturalizing an alien after he has located his claim: § 232.
Rights of aliens in the states: §§ 237, 238.
General property rights of aliens in the territories: §§ 242–244.

[3] Limits within which state may legislate: §§ 249, 250.

[4] Permissive scope of local regulations: § 270.

District regulations, generally: §§ 268–275.
Same as § 1, act 1872.
"Mineral lands" and kindred terms defined: §§ 85–98.
Rules for determining mineral character of land: § 98.

**Length of lode claims—Discovery essential to location—Width of claims—End-lines must be parallel.**

§ 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode;[5] but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.[6] No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary.[7] The end-lines of each claim shall be parallel to each other.[8]

Same as § 2, act of 1872.

[5] Length of lode claims: § 361.
Location in excess: § 362.
Surface conflicts with prior locations: § 363.

[6] Discovery as the source of miner's title: § 335.
What constitutes a valid discovery: § 336.
Where discovery must be made: § 337.
Effect of loss of discovery upon remainder of location: § 338.
Extent of locator's rights after discovery and prior to completion of location: § 339.
Surface must include apex: § 364.

[7] Width of lode claims: § 361.

[8] End-lines must be parallel: § 582.
Side-end lines: § 367.

**Proof of citizenship.**

§ 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

See § 7, act of 1872.

*Supplemented by act of April 26, 1882, which provides as follows:—*

"That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any state or territory." 22 Stats. at Large, p. 49, ch. 106.

Citizenship, how proved: § 227.

**Extralateral and intralimital rights.**

§ 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,[9] and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of

such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.[10] And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

[9] Intralimital right: §§ 548–553.

[10] Right to pursue the vein in depth prior to patent under act of 1866: See § 567.

Nature of estate in vein created by grant of "dip right": § 567.

Extralateral rights on original lode under patents issued prior to May 10, 1872: §§ 572–574.

Parallelism of end-lines not a condition precedent to exercise, under act of 1866, of extralateral right, but is under Rev. Stats., discussed: §§ 576, 582.

Extralateral right under Rev. Stats., discussed: §§ 581–594.

"Broad lodes": § 583.

Vein entering and departing through same side-line: § 584.

Vein crossing two parallel side-lines: §§ 586–589.

Vein crossing two opposite nonparallel side-lines: § 590.

Same as § 3, act of 1872.

Vein crossing one end-line and a side-line: § 591.

Vein with apex wholly within location but crossing no boundary: § 592.

Extralateral rights as to veins other than the one upon which the location is based: § 593.

Extralateral rights conferred by act of 1872 on locators of other lodes located before 1872: §§ 598–600.

Legal obstacles interrupting extralateral rights: §§ 608–615.

**Tunnels and tunnel rights—Length of tunnels.**

§ 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or

lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Same as § 4, act of 1872.

Tunnel locations prior to the enactment of federal laws: § 467.
Acts to be performed in acquiring tunnel rights: § 472.
"Line" and "face" of tunnel defined: §§ 473, 474.
Marking of tunnel locations on the ground: § 475.
Length upon discovered lode awarded to tunnel owner by above section: § 481.
Necessity for appropriation of discovered lode by surface location: § 482.
To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others? §§ 483–491.

**Local district rules—Marking boundaries—Records—Annual labor—Forfeiture—Resumption of work—Forfeiture to co-owners.**

§ 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-

two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing, or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

See note to § 5 of the act of 1872, *ante*, p. 2227.

*Tunnel Amendment, February 11, 1875.*

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to per-

form work on the surface of said lode or lodes in order to hold the same as required by said act. 18 Stats. at Large, p. 315, ch. 41.

*Amendment of January 22, 1880.*

"Provided, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, Anno Domini eighteen hundred and seventy-two." 21 Stats. at Large, p. 61, ch. 9.

*Amended as to oil placers by act of February 12, 1903, which provides:*

"That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, that said labor will tend to the development or to determine the oil-bearing character of such contiguous claims." 32 Stats. at Large, p. 825, ch. 548.

Limits within which local regulations may be made: § 270.
What is sufficient marking under federal law: § 373. Under state statutes: § 374.
Necessity and object of marking: § 371.
Time allowed for marking: § 372.
Perpetuation of monuments: § 375.
"Natural objects" and "permanent monuments" defined: § 383.
Location certificate and record: §§ 379–392.
Annual labor: §§ 623–638.
Requirement as to annual labor imperative: § 624.
Value of annual labor, how estimated: § 635.
Circumstances under which annual labor is excused: § 634.
Failure to perform labor renders claim open to relocation: §§ 642–645.
Work done within limits of a group of claims: § 630.
Forfeiture to co-owners: § 646.
Resumption of work: §§ 651–654.

**Proceedings to secure a patent.**

§ 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of

publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Same as § 7, act 1872.

*Amended January 22, 1880, by adding the following proviso:—*

"Provided, that where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits; and provided, that this section shall apply to all applications now pending for patents to mineral lands." 21 Stats. at Large, p. 61, ch. 9.

Survey for patent: §§ 670–672.

Application for lode patents and proceedings therein: §§ 677–695.

Application for placer patents and proceedings therein: §§ 699–701.

Application for millsite patents: § 708.

Application for patent, contents: § 680. Application by one of several co-owners, or by corporations: § 681.

Land embraced within the claim must be clear on tract-books: § 679.

Verification of application and proofs: § 682.

Proof of compliance with law: §§ 683–692.

Statement of fees and charges: § 693.

Application to purchase: § 694.

Proof of five hundred dollars' expenditure on placers: § 700.

For forms used in patent proceedings, see *post*, "Forms."

**Adverse claims, filing of, and suit upon.**

§ 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons

making the same, and shall show the nature, boundaries, and extent of such adverse claims, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

Substantially same as § 7, act of 1872. See note to that section.

*Supplemented by act of March 3, 1881, which provided as follows:—*

"That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title." 21 Stats. at Large, p. 505, ch. 140.

*And by the act of April 26, 1882, which provides:—*

"That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the state or territory where the adverse claimant may then be, or before any notary public of such state or territory." 22 Stats. at Large, p. 49, ch. 106.

What is and what is not subject of adverse claim: §§ 717–730.
How, when, and where adverse claim must be asserted: §§ 734–742.
Action to determine adverse claims: §§ 746–766.
Pleadings and practice: §§ 754–758.
The judgment and its effect: §§ 763–766.
What courts have jurisdiction: § 746.
From whence do state courts derive their jurisdiction to try such cases? § 750.
Are suits involving adverse claims in their nature legal or equitable? § 754.

**Description of claims upon surveyed and unsurveyed lands.**

§ 2327. The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims

upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

This section was amended by act of April 28, 1904, 33 Stats. at Large, p. 545. See discussion, § 671 of the text.

**Patents for claims located under former laws—Patents issued under prior laws.**

§ 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter, where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

See § 9, act of 1872.

Extralateral rights on other lodes conferred by act of 1872 on owners of claims previously located: §§ 598–600.

Extralateral rights on the original lode under patents issued prior to May 10, 1872: §§ 572–577.

Construction of patents applied for prior but issued subsequent to act of 1872: § 604.

**Placers and other forms of deposit not in place may be entered and patented.**

§ 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Substantially same as first clause of § 12, act of 1870.

*Supplemented by the act of August 4, 1892, which provided as follows:—*

"That any person authorized to enter lands, under the mining laws of the United States may enter lands that are chiefly valuable for building-stone under the provisions of the law in relation to placer-mineral claims: Provided, that lands reserved for the benefit of the public schools or donated to any state shall not be subject to entry under this act." 27 Stats. at Large, p. 348, ch. 375.

*Supplemented by the act of February 11, 1897, which provides as follows:—*

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: Provided, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof." 29 Stats. at Large, p. 526, ch. 216.

*Supplemented by the act of January 31, 1901, which provides as follows:—*

"That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: Provided, that the same person shall not locate or enter more than one claim hereunder." 31 Stats. at Large, p. 745, ch. 186.

*Supplemented by the act of March 2, 1911, which provides as follows:—*

"That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the

United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: Provided, however, that such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry." 36 Stats. at Large, Part I, p. 1015, ch. 201.

Character of deposits subject to appropriation under placer laws: §§ 419–428.
Placer patents: §§ 672, 673, 699–703.
Description of placer claims upon surveyed lands: § 700.
Building-stone: § 421.
Petroleum: § 422.
Salines: §§ 513–515.

**Subdivisions of claims—Group entries—Maximum extent of placers.**

§ 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

See § 12, act of 1870.

Form and extent of placer locations prior to Rev. Stats.: § 447.
Form and extent under Rev. Stats.: § 448.
Placer locations by corporations: § 449.

Locations by several persons in the interest of one: § 450.
Number of locations by an individual: § 450.

**Placer locations must conform to public surveys—Homesteads.**

§ 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

See § 16, act of 1870.
See § 16, act of 1872.

Survey of placer claims: § 672.
Description of placer claims upon surveyed lands: § 700.

**Patents obtained on adverse possession.**

§ 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Substantially same as § 13, act of 1870.
Placer patents: §§ 699–704.

Proof of title without possession under this section: § 688.
Proof of five hundred dollars' expenditure: § 701.
Proof of mineral character of land: § 702.

**Patents for lodes within placers.**

§ 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Same as § 11, act of 1872.

Right to appropriate lodes within placers: § 413.
Manner of locating lodes within placers: § 414.
Width of lode locations within placers: § 415.
Patent for lodes within placers: § 704.
What is conveyed by placer patent: § 781.
"Lodes known to exist": § 781.

**Deputy mineral surveyors—Expenses of survey and patent—Publication of notices—Designation of newspaper—Fees of officers.**

§ 2334. The surveyor-general of the United States may appoint in each land district containing mineral lands as

many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ an United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office.

Surveyors-general and deputies: § 659.
Statement of fees and charges in patent proceedings: § 693.

**Affidavits, before what officers to be made.**

§ 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated [see amendment to § 2325, *ante*], and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for

thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Same as § 13, act of 1872. See, also, § 14, act of 1870.

Proof of mineral character of lands: §§ 689, 702.

**Cross-lodes and uniting veins.**

§ 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Same as § 14, act of 1892.

Cross-lodes: §§ 557–560.
Union of veins on dip: § 614.

**Millsites, classes, patents for.**

§ 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his millsite, as provided in this section.

Same as § 15, act of 1872.

Millsites: §§ 519–524, 708.

Classes of millsites: § 520.
Right to millsite, how initiated: § 521.
Location with reference to lode: § 522.
Nature of use required in case of location by lode proprietor: § 523.
Millsite used for quartz-mill or reduction works: § 524.
Manner of acquiring patent for millsites: § 708.

**State legislatures may pass supplementary laws.**

§ 2338. As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Same as § 5, act of 1866.

Easements, drainage, etc.: §§ 252–264, 529–531.
Limits within which state may legislate: §§ 249, 250.

**Prior rights to water protected—Rights of way for ditches.**

§ 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Same as § 9, act of 1866.

Rights of way for ditches and canals: § 530.

**Patents granted, subject to easements.**

§ 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection

with such water rights, as may have been acquired under or recognized by the preceding section.

See § 17, act of 1870.

Location subject only to pre-existing easements: § 531.

**Homesteads upon mineral lands.**

§ 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this title, relating to "Homesteads."

See § 10, act of 1866.

Character of lands, when and how established: §§ 107, 207, 717.
Homestead and other agricultural lands: §§ 202–212.

**Secretary of interior may set apart agricultural lands.**

§ 2342. Upon the survey of the lands described in the preceding section, the secretary of the interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

See § 11, act of 1866.

**Additional land districts, establishment of.**

§ 2343. The president is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for

the public convenience in executing the provisions of this chapter.

See § 7, act of 1866.

**Construction of act, generally.**

§ 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

See § 8, act of 1866.
See § 16, act of 1872.

Laws of 1866 and 1870 discussed: §§ 53–64.

**Mining laws not applicable to certain states.**

§ 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the states of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the states named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

*Supplemented by act of May 5, 1876, which provided as follows:—*

"That within the states of Missouri and Kansas, deposits of coal, iron, lead or other mineral be and they are hereby excluded from the operation of the act entitled 'An act to promote the development of the mining resources of the United States,' approved May tenth, eighteen hundred and seventy-

two, and all lands in said states shall be subject to disposal as agricultural lands." 19 Stats. at Large, p. 52, ch. 91.

*Supplemented by act of March 3, 1883, which provided as follows:—*

"That within the state of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: Provided, however, that all lands which have heretofore been reported to the general land office as containing coal and iron shall first be offered at public sale: And provided further; that any *bona fide* entry under the provisions of the homestead law of lands within said state heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled 'An act to promote the development of the mining resources of the United States,' in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto." 22 Stats. at Large, p. 487, ch. 118.

States wherein federal mining laws are operative: §§ 18–21.

**Mineral lands not granted to states or corporations.**

§ 2346. No act passed at the first session of the thirty-eighth congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Act of January 30, 1865.

## V. THE WITHDRAWAL ACTS AND REGULATIONS THEREUNDER.

For a history and discussion of these acts, see § 200c.

*An act to authorize the president of the United States to make withdrawals of public lands in certain cases.*

36 Stats. at Large, ch. 421, p. 847.

**Act of June 25, 1910.**

The president may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of congress.

§ 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, that the rights of any person who at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, that this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: And provided further, that there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been

made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, that hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the states of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of congress.

§ 3. That the secretary of the interior shall report all such withdrawals to congress at the beginning of its next regular session after the date of the withdrawals.

**Act amending act of June 25, 1910.**

37 Stats. at Large, ch. 369, p. 497.

That section two of the act of congress approved June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page 847), be, and the same hereby is, amended to read as follows:

"§ 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: Provided further, that this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: And provided further, that there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the

date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, that hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the states of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of congress." (Approved August 24, 1912.)

INSTRUCTIONS UNDER ACTS OF JUNE 22 AND 25, 1910, AND MARCH 3, 1909.

Department of the Interior,
Washington, March 6, 1911.

The Commissioner of the General Land Office.

SIR: The act of June 25, 1910 (36 Stat. 847), provides that the president may at any time in his discretion temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification, or other public purposes, to be specified in the orders of withdrawal, such withdrawal to remain in force until revoked by him or by an act of congress.

Section 2 of the act provides that lands so withdrawn shall at all times be open to exploration, discovery, occupancy and purchase under the mining laws, excepting those relating to coal, oil, gas and posphates, there being a further provision, however, to the effect that the order of withdrawal shall not impair or affect the rights of any person who, prior to the date of the withdrawal, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to the discovery of oil or gas. No hard-or-fast rule can be established fixing the amount of work which must have been done by the occupant prosecuting work

leading to the discovery of oil or gas. Each case must rest upon its own showing of diligence when application for patent is filed.

The chief of field division should be advised of all such applications and should be prepared to submit showing if possible, before the issuance of final certificate of entry.

This section contains further provision to the effect that there shall be excepted from the force and effect of any withdrawal all lands which are on the date of withdrawal embraced in any lawful homestead, or desert-land entry theretofore made or upon which any valid settlement has been made, and is at that time being maintained and perfected pursuant to law. Applications to make nonmineral entries by settlers claiming the benefits of the above-mentioned provisions of section 2 will be referred to the chief of the appropriate field division for investigation and report before final action is taken thereon.

Withdrawals provided for under this act include those made for the purpose of classifying coal lands, and it seems that after the passage of this act the previous coal withdrawals were renewed thereunder.

The act of March 3, 1909 (35 Stat. 844), is for the protection of surface rights of nonmineral entrymen where the lands were subsequently classified, claimed, or reported as being valuable for coal, and the act of June 22, 1910 (36 Stat. 583), provides for the allowance of certain nonmineral entries for land having been withdrawn or classified as coal lands. These acts have separated the surface from the coal deposits for the purpose of allowance of certain nonmineral entries, and it is not believed that the act of June 25, 1910, under consideration was intended to repeal said acts. Therefore, where applications are presented to make final proof on nonmineral entries made prior to withdrawal, for the purposes of classifying the coal deposits, the disposition of such applications should be made with especial reference to the provisions of the act of March 3, 1909, *supra,* and as to such lands certain nonmineral entries may be allowed, as provided for by the

act of June 22, 1910, *supra*, notwithstanding their withdrawal under act of June 25, 1910.

Mineral applications for mining claims perfected upon oil, gas, or phosphate lands prior to withdrawal, or for such claims upon lands chiefly valuable for other minerals, whether perfected before or after withdrawal, or for claims of the latter class within power-site withdrawals, and applications to submit final proof upon homestead, desert-land, and settlement claims, initiated prior to a withdrawal, will be referred to the chief of field division, with the appropriate notation of the character of the withdrawal involved, in accordance with the practice under paragraph 5 et seq., of the circular of April 24, 1907, *supra*, for field examination and full report of all facts touching the character of the land and affecting the validity of the location, claim, or entry, as the case may be, including the possibility of water-power development, if any.

In the administration of the act hereunder, you will also be governed by the circular approved January 27, 1911, relative to co-operation between the Geological Survey and the general land office.

It is believed that the foregoing will enable you to properly advise the local officers in all matters necessary to put this act into operation; and where an application is received, not specifically provided for herein, you will act upon the same, affording aggrieved parties the usual right of appeal.

Very respectfully,
R. A. BALLINGER,
Secretary.

MODIFICATION OF OUTSTANDING ORDERS OF WITHDRAWAL.

Department of the Interior,
General Land Office,
Washington, October 21, 1912.

Registers and Receivers,
United States Land Offices.

SIRS: Your attention is called to the act of congress approved August 24, 1912 (Public, No. 316), amending section 2

of the act of congress approved June 25, 1910 (36 Stat. 847), copy of which is herewith attached.

You will note that the provision of the said act of June 25, 1910, that all lands withdrawn under the provisions of that act shall, at all times, be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, "so far as the same apply to minerals other than coal, oil, gas, and phosphates," is changed by the amendment, so as to provide that such lands shall, at all times, be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, "so far as the same apply to metalliferous minerals." By the approval on August 24, 1912, of the said act, all outstanding orders of withdrawal under the act of June 25, 1910, were modified to conform to the act approved June 25, 1910, as amended by the act of August 24, 1912; and upon the approval of said last-named act, the lands embraced in such orders of withdrawal ceased to be and are not open to exploration, discovery, occupation, or purchase under the mining laws of the United States, except for metalliferous minerals.

These instructions are in addition and supplementary to instructions of March 6, 1911 (36 L. D. 544).

You will exercise care in the enforcement of this important modification of the withdrawal orders.

Yours respectfully,
FRED DENNETT,
Commissioner.

Approved October 21, 1912.
SAMUEL ADAMS,
First Assistant Secretary.

## VI. MINING LEGISLATION FOR THE PHILIPPINE ISLANDS.

(An act temporarily to provide for the administration of the affairs of civil government in the Philippine islands, and for other purposes, was originally approved July 1, 1902 (32 Stats. at Large, p. 691), and contained elaborate provisions relating to mineral lands. This act was amended February 6, 1905 (33 Stats. at Large, p. 692). The original act provided for measurements in feet. The amendatory act substitutes meters. The act in its amended form is as follows:)

### MINERAL LANDS.

**Public mineral lands reserved—Exception.**

§ 20. That in all cases public lands in the Philippine islands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

**Lands open to acquisition—Who may acquire—Mineral lands already entered as agricultural, how retained.**

§ 21. That all valuable mineral deposits in public lands in the Philippine islands, both surveyed and unsurveyed, are hereby declared to be free and open to exploration, occupation, and purchase, and the land in which they are found to occupation and purchase, by citizens of the United States, or of said islands; provided, that when on any lands in said islands entered and occupied as agricultural lands under the provisions of this act, but not patented, mineral deposits have been found, the working of such mineral deposits is hereby forbidden until the person, association, or corporation who or which has entered and is occupying such lands shall have paid to the government of said islands such additional sum or sums as will make the total amount paid for the mineral claim or claims in which said deposits are located equal to the amount charged by the government for the same as mineral claims.

**Future locations of mining claims—Manner and conditions of locating—Square location, how measured.**

§ 22. That mining claims upon land containing veins or lodes of quartz or other rock in place, bearing gold, silver,

cinnabar, lead, tin, copper or other valuable deposits, located after the passage of this act whether located by one or more persons qualified to locate the same under the preceding section, shall be located in the following manner and under the following conditions: Any person so qualified desiring to locate a mineral claim, shall, subject to the provisions of this act with respect to land which may be used for mining, enter upon the same and locate a plot of ground measuring, where possible, but not exceeding, three hundred meters in length by three hundred meters in breadth, in as nearly as possible a rectangular form; that is to say: All angles shall be right angles, except in cases where a boundary line of a previously surveyed claim is adopted as common to both claims, but the lines need not necessarily be meridional. In defining the size of a mineral claim, it shall be measured horizontally, irrespective of inequalities of the surface of the ground.

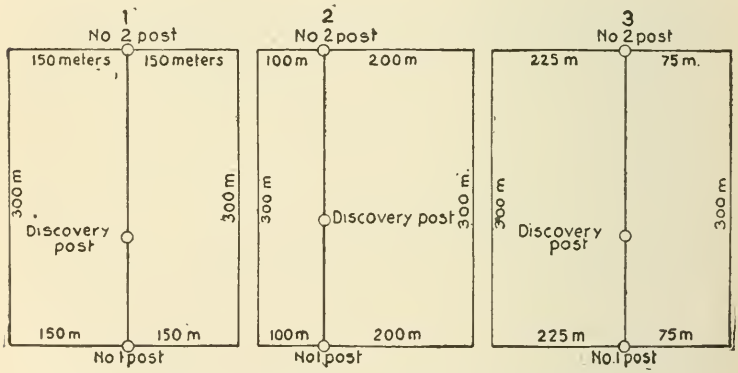
**Posting and marking of claim—Location line—Notice of location—Part of record to be furnished to mining recorder.**

§ 23. That a mineral claim shall be marked by two posts placed as nearly as possible on the line of the ledge or vein, and the posts shall be numbered one and two, and the distance between posts numbered one and two shall not exceed three hundred meters, the line between posts numbered one and two to be known as the location line; and upon posts numbered one and two shall be written the name given to the mineral claim, the name of the locator, and the date of the location. Upon post numbered one there shall be written, in addition to the foregoing, "Initial post," the approximate compass bearing of post numbered two, and a statement of the number of feet lying to the right and to the left of the line from post numbered one to post numbered two, thus: "Initial post. Direction of post numbered two. —— meters of this claim lie on the right and —— meters on the left of the line from number one to number two post." All the particulars required to be put on number one and number two posts shall be furnished by the locator to the provincial secretary, or such other officer

as by the Philippine government may be described as mining recorder, in writing, at the time the claim is recorded, and shall form a part of the record of such claim.

**Marking location line—Discovery post—Surveyor, by what guided.**

§ 24. That when a claim has been located the holder shall immediately mark the line between posts numbered one and two so that it can be distinctly seen. The locator shall also place a post at the point where he has found minerals in place, on which shall be written "Discovery post"; provided, that when the claim is surveyed the surveyor shall be guided by the records of the claim, the sketch plan on the back of the declaration made by the owner when the claim was recorded, posts numbered one and two, and the notice on number one, the initial post.




Examples of Various Modes of Laying Claims.

**Posts movable, when.**

§ 25. That it shall not be lawful to move number one post, but number two post may be removed by the deputy mineral surveyor when the distance between posts numbered one and two exceeds three hundred meters, in order to place number two post three hundred meters from number one post on the line of location. When the distance between posts numbered one and two is less than three hundred meters the deputy

mineral surveyor shall have no authority to extend the claim beyond number two.

**Location line governs direction of one side-line.**

§ 26. That the "location line" shall govern the direction of one side of the claim, upon which the survey shall be extended according to this act.

**Claimant's rights—No extralateral—Existing claims.**

§ 27. That the holder of a mineral claim shall be entitled to all minerals which may lie within his claim, but he shall not be entitled to mine outside the boundary lines of this claim continued vertically downward; provided, that this act shall not prejudice the rights of claim-owners nor claim-holders whose claims have been located under existing laws prior to this act.

**Recording—Affidavit to accompany application.**

§ 28. That no mineral claim of the full size shall be recorded without the application being accompanied by an affidavit made by the applicant, or some person on his behalf cognizant of the facts, that the legal notices and posts have been put up; that mineral has been found in place on the claim proposed to be recorded; that the ground applied for is unoccupied by any other person. In the said declaration shall be set out the name of the applicant and the date of the location of the claim. The words written on the number one and number two posts shall be set out in full, and as accurate a description as possible of the position of the claim given with reference to some natural object or permanent monuments.

**Under-sized claims—Requisites to recordation—Effect of failure to comply.**

§ 29. That no mineral claim which at the date of its record is known by the locator to be less than a full-sized mineral claim shall be recorded without the word "fraction" being added to the name of the claim, and the application being accompanied by an affidavit of solemn declaration made by

the applicant, or some person on his behalf cognizant of the facts, that the legal posts and notices have been put up; that mineral has been found in place on the fractional claim proposed to be recorded; that the ground applied for is unoccupied by any other person. In the said declaration shall be set out the name of the applicant and the date of the location of the claim. The words written on the posts numbered one and two shall be set out in full, and as accurate a description as possible of the position of the claim given. A sketch plan shall be drawn by the applicant on the back of the declaration, showing as near as may be the position of the adjoining mineral claims and the shape and size, expressed in meters of the claim or fraction desired to be recorded; provided, that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bona fide* attempt to comply with the provisions of this act, and that the nonobservance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

**Marking location—Cases of especial difficulty.**

§ 30. That in cases where, from the nature or shape of the ground, it is impossible to mark the location line of the claim as provided by this act, then the claim may be marked by placing posts as nearly as possible to the location line, and noting the distance and direction such posts may be from such location line, which distance and direction shall be set out in the record of the claim.

**Recording, when—Penalty for failure—Mining records, how kept.**

§ 31. That every person locating a mineral claim shall record the same with the provincial secretary or such other officer as by the government of the Philippine islands may be described as mining recorder of the district within which

the same is situate, within thirty days after the location thereof. Such record shall be made in a book to be kept for the purpose in the office of the said provincial secretary or such other officer as by said government described as mining recorder, in which shall be inserted the name of the claim, the name of each locator, the locality of the mine, the direction of the location line, the length in meters, the date of location, and the date of the record. A claim which shall not have been recorded within the prescribed period shall be deemed to have been abandoned.

**Priority governs in case of dispute.**

§ 32. That in case of any dispute as to the location of a mineral claim the title to the claim shall be recognized according to the priority of such location, subject to any question as to the validity of the record itself and subject to the holder having complied with all the terms and conditions of this act.

**Holder limited to one location on each vein.**

§ 33. That no holder shall be entitled to hold in his, its, or their own name or in the name of any other person, corporation, or association more than one mineral claim on the same vein or lode.

**Holder may abandon claim, how—Effect of.**

§ 34. That a holder may at any time abandon any mineral claim by giving notice, in writing, of such intention to abandon, to the provincial secretary or such other officer as by the government of the Philippine islands may be described as mining recorder; and from the date of the record of such notice all his interest in such claim shall cease.

**Proof of citizenship, how made.**

§ 35. That proof of citizenship under the clauses of this act relating to mineral lands may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon in-

formation and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, or of the Philippine islands, by the filing of a certified copy of their charter or certificate of incorporation.

**Commission may make regulations—Assessment work—Relocation—Resumption of work—Co-owner's failure to contribute to assessment work.**

§ 36. That the United States Philippine commission or its successors may make regulations, not in conflict with the provisions of this act, governing the location, manner of recording, the amount of work necessary to hold possession of a mining claim, subject to the following requirements:

On each claim located after the passage of this act, and until a patent has been issued therefor, not less than two hundred pesos' worth of labor shall be performed or improvements made during each year; provided, that upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required thereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, and in two newspapers published at Manila, one in the English language and the other in the Spanish language, to be designated by the chief of the Philippine insular bureau of public lands, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required

expenditures. The period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim.

**Patent, how obtained—Conclusiveness of—Application by nonresident claimant.**

§ 37. That a patent for any land claimed and located for valuable mineral deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this act, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this act, may file in the office of the provincial secretary, or such other officer as by the government of said islands may be described as mining recorder of the province wherein the land claimed is located, an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the chief of the Philippine insular bureau of public lands, showing accurately the boundaries of the claim, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such office, and shall thereupon be entitled to a patent for the land, in the manner following: The provincial secretary, or such other officer as by the Philippine government may be described as mining recorder, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such an application has been made, once a week for the period of sixty days in a newspaper to be by him designated as nearest to such claim and in two newspapers published at Manila, one in the English language and one in the Spanish language, to be designated by the chief of the Philippine insular bureau of public lands; and he shall also post such notice in his office

for the same period. The claimant at the time of filing this application, or at any time thereafter within the sixty days of publication, shall file with the provincial secretary or such other officer as by the Philippine government may be described as mining recorder a certificate of the chief of the Philippine insular bureau of public lands that one thousand pesos' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the provincial secretary or such other officer as by the government of said islands may be described as mining recorder at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the provincial treasurer or the collector of internal revenue of twenty-five pesos per hectare and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this act; provided, that where the claimant for a patent is not a resident of or within the province wherein the land containing the vein, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

**Nonresident applicants—Where may make oath.**

§ 38. That applicants for mineral patent, if residing beyond the limits of the province or military department wherein the claim is situated, may make the oath or affidavit required for proof of citizenship before the clerk of any

court of record, or before any notary public of any province of the Philippine islands, or any other official in said islands authorized by law to administer oaths.

**Adverse claim—Requisites—Stays proceedings on application for patent—Proceedings on—Effect of failure to establish title in either party—Alienation of patented ground.**

§ 39. That where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavits thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the provincial secretary or such other officer as by the government of the Philippine islands may be described as mining recorder, together with the certificate of the chief of the Philippine insular bureau of public lands that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the provincial treasurer or the collector of internal revenue of the province in which the claim is situated, as the case may be, twenty-five pesos per hectare, for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the provincial secretary or such other officer as by said government may be described as mining recorder to the secretary of the interior of the Philippine islands, and a patent shall

issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, rightly to possess. The adverse claim may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the province wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record, or any notary public of any province or military department of the Philippine islands, or any other officer authorized to administer oaths where the adverse claimant may then be. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the chief of the Philippine insular bureau of public lands, whereupon the provincial secretary or such other officer as by the government of said islands may be described as mining recorder shall certify the proceedings and judgment-roll to the secretary of the interior for the Philippine islands, as in the preceding case, and patents shall issue to the several parties according to their respective rights. If in any action brought pursuant to this section title to the ground in controversy shall not be established by either party, the court shall so find, and judgment shall be entered accordingly. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the office of the provincial secretary or such other officer as by the government of said islands may be described as mining recorder or be entitled to a patent for the ground in controversy until he shall have perfected his title. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

**Description of claims on surveyed lands—Extension of surveys.**

§ 40. That the description of mineral claims upon surveyed lands shall designate the location of the claim with reference

to the line of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands the chief of the Philippine insular bureau of public land in extending the surveys shall adjust the same to the boundaries of such patented claim according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

**Lands valuable for building-stone subject to placer laws.**

§ 41. That any person authorized to enter lands under this act may enter and obtain patent to lands that are chiefly valuable for building-stone under the provisions of this act relative to placer mineral claims.

**Lands valuable for mineral oils subject to placer laws.**

§ 42. That any person authorized to enter lands under this act may enter and obtain patent to land containing petroleum or other mineral oils and chiefly valuable therefor under the provisions of this act relative to placer mineral claims.

**Placer claims—Size limit—Must conform to public surveys—Agricultural ownership protected.**

§ 43. That no location of a placer claim shall exceed sixty-four hectares for any association of persons, irrespective of the number of persons composing such association, and no such location shall include more than eight hectares for an individual claimant. Such locations shall conform to the laws of the United States Philippine commission, or its successors, with reference to public surveys, and nothing in this section contained shall defeat or impair any *bona fide* ownership of land for agricultural purposes, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

**Same—Conformance to legal subdivisions—Fractions may be entered, how.**

§ 44. That where placer claims are located upon surveyed lands and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located

after the date of passage of this act shall conform as nearly as practicable to the Philippine system of public-land surveys and the regular subdivisions of such surveys; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than sixteen hectares shall remain, such fractional portion of agricultural land may be entered by any party qualified by law for homestead purposes.

**Same—Patent, when right to established—Liens protected.**

§ 45. That where such person or association, they and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations of the Philippine islands, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim; but nothing in this act shall be deemed to impair any lien which may have attached in any way whatever prior to the issuance of a patent.

**Appointment of deputy mineral surveyors—Expense of surveys borne by applicants—Regulation of charges for surveys and publication.**

§ 46. That the chief of the Philippine insular bureau of public lands may appoint competent deputy mineral surveyors to survey mining claims. The expenses of the survey of vein or lode claims and of the survey of placer claims, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any such deputy mineral surveyor to make the survey. The chief of the Philippine insular bureau of public lands shall also have power to establish the maximum charges for surveys and publication of notices under this act; and in case of excessive charges for publication he may designate any newspaper published in a province where mines are situated, or in Manila, for the publication of mining notices, and fix the

rates to be charged by such paper; and to the end that the chief of the bureau of public lands may be fully informed on the subject such applicant shall file with the provincial secretary, or such other officer as by the government of the Philippine islands may be described as mining recorder, a sworn statement of all charges and fees paid by such applicant for publication and surveys, and of all fees and money paid the provincial treasurer or the collector of internal revenue, as the case may be, which statement shall be transmitted, with the other papers in the case, to the secretary of the interior for the Philippine islands.

**Affidavits—Adverse proceedings—Notice, how given.**

§ 47. That all affidavits required to be made under this act may be verified before any officer authorized to administer oaths within the province or military department where the claims may be situated, and all testimony and proofs may be taken before any such officer, and when duly certified by the officer taking the same, shall have the same force and effect as if taken before the proper provincial secretary or such other officer as by the government of the Philippine islands may be described as mining recorder. In cases of contest as to the mineral or agricultural character of land the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication at least once a week for thirty days in a newspaper to be designated by the provincial secretary or such other officer as by said government may be described as mining recorder published nearest to the location of such land and in two newspapers published in Manila, one in the English language and one in the Spanish language, to be designated by the chief of the Philippine insular bureau of public lands; and the provincial secretary or such other officer as by said government may be described as mining recorder shall require proofs that such notice has been given.

**Millsites.**

§ 48. That where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein

or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location of such nonadjacent land shall exceed two hectares, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode. The owner of a quartz-mill or reduction works not owning a mine in connection therewith may also receive a patent for his millsite as provided in this section.

**Regulations governing operation may be imposed as condition of sale—Bonds of deputy surveyors.**

§ 49. That as a condition of sale the government of the Philippine islands may provide rules for working, policing, and sanitation of mines, and rules governing easements, drainage, water rights, right of way, right of government survey and inspection, and other necessary means to their complete development not inconsistent with the provisions of this act, and those conditions shall be fully expressed in the patent. The Philippine commission or its successors are hereby further empowered to fix the bonds of deputy mineral surveyors.

**Water rights protected.**

§ 50. That whenever by priority of possession right to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

**Same—Patents subjected to vested water rights.**

§ 51. That all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section.

**Land districts—Officers—Proceedings therein.**

§ 52. That the government of the Philippine islands is authorized to establish land districts and provide for the appointment of the necessary officers wherever they may deem the same necessary for the public convenience, and to further provide that in districts where land offices are established proceedings required by this act to be had before provincial officers shall be had before the proper officers of such land offices.

**Coal lands, who may enter—Size limit of claim—Conditions of entry.**

§ 53. That every person above the age of twenty-one years, who is a citizen of the United States, or of the Philippine islands, or who has acquired the rights of a native of said islands under and by virtue of the treaty of Paris, or any association of persons severally qualified as above, shall, upon application to the proper provincial treasurer, have the right to enter any quality of vacant coal lands of said islands not otherwise appropriated or reserved by competent authority, not exceeding sixty-four hectares to such individual person, or one hundred and twenty-eight hectares to such association, upon payment to the provincial treasurer or the collector of internal revenue, as the case may be, of not less than fifty pesos per hectare for such lands, where the same shall be situated more than twenty-five kilometers from any completed railroad or available harbor or navigable stream, and not less than one hundred pesos per hectare for such lands as shall be within twenty-five kilometers of such road, harbor, or stream; provided, that such entries shall be taken in squares of sixteen or sixty-four hectares, in conformity with the rules

and regulations governing the public land surveys of the said islands in plotting legal subdivisions.

**Same—Preference given those in possession.**

§ 54. That any person or association of persons, severally qualified as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry under the preceding section of the mines so opened and improved.

**Same—Procedure to perfect possessory rights.**

§ 55. That all claims under the preceding section must be presented to the proper provincial secretary within sixty days after the date of actual possession and the commencement of improvements on the land by the filing of a declaratory statement therefor; and where the improvements shall have been made prior to the expiration of three months from the date of the passage of this act, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement; and no sale under the provisions of this act shall be allowed until the expiration of six months from the date of the passage of this act.

**Same—But one entry by any person or association allowed—Saline claimants, when must pay—Penalty for failure.**

§ 56. That the three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such section shall enter or hold any other lands under their provisions; and all persons claiming under section fifty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure

to file the proper notice or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

**Same—Adverse claims—Preference—Regulations authorized.**

§ 57. That in case of conflicting claims upon coal lands where the improvements shall be commenced after the date of the passage of this act, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the passage of this act, division of the land claimed may be made by legal subdivisions, which shall conform as nearly as practicable with the subdivisions of land provided for in this act, to include as near as may be the valuable improvements of the respective parties. The government of the Philippine islands is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and preceding sections relating to mineral lands.

**Salines, how disposed of—Publication of proclamations respecting sale of.**

§ 58. That whenever it shall be made to appear to the secretary of any province or the commander of any military department in the Philippine islands that any lands within the province are saline in character, it shall be the duty of said provincial secretary or commander, under the regulations of the government of the Philippine islands, to take testimony in reference to such lands, to ascertain their true character, and to report the same to the secretary of the interior for the Philippine islands; and if, upon such testimony, the secretary of the interior shall find that such lands are saline and incapable of being purchased under any of the laws relative to the public domain, then and in such case said lands shall be offered for sale at the office of the provincial secretary or such other officer as by the said government may be described as mining recorder of the province or department in which the same shall be situated, as the case may be, under such

regulations as may be prescribed by said government, and sold to the highest bidder, for cash, at a price of not less than six pesos per hectare; and in case such lands fail to sell when so offered, then the same shall be subject to private sale at such office, for cash, at a price not less than six pesos per hectare, in the same manner as other lands in the said islands are sold. All executive proclamations relating to the sales of public saline lands shall be published in only two newspapers, one printed in the English language and one in the Spanish language, at Manila, which shall be designated by said secretary of the interior.

**Construction of land grant acts.**

§ 59. That no act granting lands to provinces, districts, or municipalities to aid in the construction of roads, or for other public purposes, shall be so construed as to embrace mineral lands, which, in all cases, are reserved exclusively, unless otherwise specially provided in the act or acts making the grant.

**Concessions prior to April 11, 1899, unaffected—Procedure by owners necessary to retain—Penalty for failure.**

§ 60. That nothing in this act shall be construed to affect the rights of any person, partnership, or corporation having a valid, perfected mining concession granted prior to April eleventh, eighteen hundred and ninety-nine, but all such concessions shall be conducted under the provisions of the law in force at the time they were granted, subject at all times to cancellation by reason of illegality in the procedure by which they were obtained, or by failure to comply with the conditions prescribed as requisite to their retention in the laws under which they were granted; provided, that the owner or owners of every such concession shall cause the corners made by its boundaries to be distinctly marked with permanent monuments within six months after this act has been promulgated in the Philippine islands, and that any concessions the boundaries of which are not so marked within this period shall

be free and open to explorations and purchase under the provisions of this act.

**Subsequent rights.**

§ 61. That mining rights on public lands in the Philippine islands shall, after the passage of this act, be acquired only in accordance with its provisions.

**Cancellation of concessions.**

§ 62. That all proceedings for the cancellation of perfected Spanish concessions shall be conducted in the courts of the Philippine islands having jurisdiction of the subject matter and of the parties, unless the United States Philippine commission, or its successors, shall create special tribunals for the determination of such controversies.

## VII. LAND DEPARTMENT REGULATIONS UPON SUBJECT OF MINERAL LANDS OTHER THAN COAL.

The latest regulations issued by the department were approved March 29, 1909, and appear in vol. 37 L. D. 728 et seq. They were reprinted in pamphlet form November 6, 1912, with amendments and addenda.

Force and effect of decisions and regulations of land department: §§ 664–666.

**Classes of mining claims.**

1. Mining claims are of two distinct classes: Lode claims and placers.

Lode claims: §§ 322, 323.
Placer claims: §§ 419–428.

### LODE CLAIMS.

**Status of lode claims located prior to May 10, 1872.**

2. The *status* of lode claims located or patented previous to the tenth day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections twenty-three hundred and twenty-two and twenty-three hundred and twenty-eight, by investing the locator, his heirs or assigns, with the right to follow, upon the

conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

Changes made by act of May 10, 1872: § 71.

**Same—Possessory right to veins other than the one located.**

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed May 10, 1872,* and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

This section does not dispense with the necessity on the part of the party so adversely claiming to file an adverse claim in the land office under the provisions of section 2325 of the Revised Statutes, if patent for the vein claimed by him is applied for by other parties.

Brady's Mortgagees v. Harris (on review), 29 L. D. 426, 429.

See *ante,* § 726.

**Lode locations made after May 10, 1872—Length of.**

4. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet;* but in no event can a location of a vein or lode made after the tenth day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

Length of lode location: § 361.

**Same—Extent of surface ground—Width on one side of vein.**

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no

case *exceed three hundred feet on each side of the middle of the vein at the surface,* and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end-lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: Four hundred feet cannot be taken on one side and two hundred feet on the other. If, however, three hundred feet on each side are allowed, and by reason of prior claims but one hundred feet can be taken on one side, the locator will not be restricted to less than three hundred feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

**Same—Local laws and regulations.**

6. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or state or territorial laws in force in the several mining districts; and that no such local regulations or state or territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the tenth day of May, 1872, render such lateral limitation necessary.

Surface area, length, and width of lode claims: § 361 et seq.

**Defining locations—Contents of record—Description.**

7. Locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872,

shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

Location certificate and its contents: §§ 379–385.

**Discovery condition precedent to location—Object of rule.**

8. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

The discovery: §§ 328, 329, 335–339.

**Discovery shaft or equivalent—Course of vein—Description in location notice.**

9. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

Relationship of discovery to discovery shaft: § 345.
Discovery shaft and its equivalent: §§ 343–346.
Preliminary notice and its posting: §§ 350–356.
Location certificate and its contents: §§ 379–385.

**Contents of location notice—Marking boundaries.**

10. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

Preliminary notice and its posting: §§ 330–356.
Location certificate and its contents: §§ 379–385.

**Recording location notice.**

11. The location notice must be filed for record in all respects as required by the state or territorial laws and local rules and regulations, if there be any.

Recording notice or certificate of location: §§ 389–392.

**Annual labor—Amount—Time of performance.**

12. In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that *ten dollars* shall be expended annually for each *one hundred feet* in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually. Under the provisions of the act of congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Where a number of contiguous claims are held in common, the aggregate expenditure that would be necessary to

hold all the claims may be made upon any one claim. Cornering claims are held not to be contiguous.

Annual labor discussed: §§ 623–638.

**Same—Effect of failure to perform—Not required after entry.**

13. Failure to make the expenditure or perform the labor required, upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

14. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

Annual labor discussed: §§ 623–638.

**Same—Forfeiture of interest of noncontributing co-owner.**

15. Upon the failure of any one of several co-owners to contribute his proportion of the required expenditures, the co-owners who have performed the labor or made the improvements as required may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

Forfeiture to co-owners: § 646.

TUNNELS.

**Rights of tunnel claimant stated—Term "face" defined.**

16. The effect of section twenty-three hundred and twenty-three, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof,* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

Tunnel claims: § 467 et seq.
Rights accruing to tunnel proprietor: §§ 479–491.
"Face" of tunnel defined: § 474.

**Notice of tunnel location—Posting—Contents—Marking boundaries on surface.**

17. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to

locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

Acts to be performed in acquiring tunnel rights: § 472.
Line of tunnel defined: § 473.
Marking of tunnel location: § 475.

**Recording notice of tunnel location—Sworn statement.**

18. A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

Recording notice of tunnel location: § 472.

## PLACER CLAIMS.

**One discovery sufficient.**

19. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual,

or of one hundred and sixty acres or less by an association of persons.

Discovery in placer locations: §§ 437–438.
Rule stated in this paragraph discussed: § 438.

**Placer entry of lands valuable for building-stone.**

20. The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building-stone within the provisions of said law, by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any state are not subject to entry under said act.

Lands chiefly valuable for building-stone: § 139.
"Stone and timber act" discussed: § 210.
Building-stone subject to entry under placer laws: § 421.

**Oil land entries—Act of February 11, 1897.**

21. The act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

Petroleum lands: § 138.
Petroleum subject to entry under placer laws: § 422.

**Ten-acre lots to be dealt with as legal subdivisions.**

22. By section twenty-three hundred and thirty authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.

Form and extent of placer locations: §§ 447, 448.

23. [Omitted from regulations as approved March 29, 1909.]

Description of placer claims upon surveyed lands: § 700.

**Description of ten-acre lots in application for patent.**

24. A ten-acre subdivision may be described, for instance if situated in the extreme northeast of the section, as the "NE. ¼ of the NE. ¼ of the NE. ¼" of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

See Roman Placer Mining Claim, 34 L. D. 260.

**Proof of improvements and expenditure.**

25. The proof of improvements must show their value to be not less than *five hundred dollars,* and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of one hundred dollars, required by section twenty-three hundred and twenty-four, Revised Statutes, must be made upon placer as well as lode locations.

Description of placers: § 700.
Proof of expenditure: § 701.

**Known lodes within placers—Application for patent.**

26. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field-notes and plat giving the area of the lode claim or claims and the area of the placer separately. An application which omits to claim such a known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to

the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

Proof of no known lodes: § 703.
Application for lodes within placers: § 704.

**Limit of area of placer location.**

27. By section twenty-three hundred and thirty it is declared that no location of a placer claim made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

Form and extent of placers: §§ 447–450.
"Placer act": § 62.

**Same—Placer locations to conform to public surveys.**

28. Section twenty-three hundred and thirty-one provides that all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

See note to paragraph 27.

**Same.**

29. The foregoing provisions of law are construed to mean that after the ninth day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two persons cannot exceed forty acres, and one by three persons cannot exceed sixty acres.

See note to paragraph 27.

**Marking boundaries—Record.**

30. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on

record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

Conformity to the public land surveys and the rectangular subdivisions thereof will not be required where compliance with such requirement would necessitate the placing of the lines thereof upon other prior located claims or where the claim is surrounded by prior locations.

Where a placer location by one or two persons can be entirely included within a square forty-acre tract, by three or four persons within two square forty-acre tracts placed end to end, by five or six persons within three square forty-acre tracts and by seven or eight persons within four square forty-acre tracts, such locations will be regarded as within the requirements where strict conformity is impracticable.

Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the government to have all entries whether of agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. Snow Flake Fraction Placer, 37 L. D. 250.

Marking boundaries of placer locations: §§ 454, 455.
Requirements of placer location: §§ 432, 433.
Posting notices and development work: §§ 442, 443.
Location certificate and its record: § 459.

## REGULATIONS UNDER SALINE ACT.

**Location under placer laws—Locator restricted to one claim.**

31. Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer mining claims are extended to all states and territories and the District of Alaska, so as to permit the location and purchase thereunder of all unoccupied public land containing salt springs or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

Subject to entry under mining laws: § 97.
Salines generally: §§ 513–515.

**Assignee of saline location may make entry of one claim.**

32. Rights obtained by location under the placer mining laws are assignable, and the assignee may make the entry in his own name; so, under this act, a person holding as assignee may make entry in his own name; provided, he has not held under this act, at any time, either as locator or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

See note to paragraph 31.

**Proof by applicant that he has made no other locations.**

33. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record and the application for patent must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. The application for patent should also be accompanied by a showing under oath, fully disclosing the qualifications as defined by

the proviso, of the applicant's predecessors in interest. (As amended June 4, 1912.)

See note to paragraph 31.

## PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

### LODE CLAIMS.

**Survey for patent—Plats and copy of field-notes to be furnished by surveyor-general.**

34. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the state or territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field-notes in each case will be prepared by the surveyor-general; one plat and the original field-notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field-notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor-general for the state of Arkansas, applications for the survey of mineral claims in said state should be made to the commissioner of this office, who, under the law, is *ex officio* the United States surveyor-general.

Survey for patent: §§ 670–673.
Survey for lode claims: § 671.
Posting of notice and plat on claim: § 677.
Filing of field-notes and plat with register: § 678.
See instructions of July 29, 1911, 40 L. D. 216.

**Record of location notice to precede survey and plat—Location survey.**

35. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must

be made subsequent to the recording of the location of the claim (if the laws of the state or territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States deputy surveyor such location survey cannot be substituted for that required by the statute, as above indicated.

Recording location notice: §§ 250, 389–392.
Survey of lode claim: § 671.

**Surveys, numbering of—Tying claim to corners of public surveys or mineral monuments.**

36. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field-notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the *locus* of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length[1] and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.[2]

[1] The fact that the connecting line is more than two miles in length should not of itself vitiate the survey, if there is otherwise a substantial compliance with the rules. In re Standart, 25 L. D. 262, 264.

[2] Survey of lode claim for patent: § 671.

**Diagram of fractional subdivisions.**

37. (a) Promptly upon the approval of a mineral survey the surveyor-general will advise both this office and the appropriate local land office, by letter (Form 4–286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral surveyor who made the survey; and will also briefly describe therein the *locus* of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

(b) Upon application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already reallotted in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet relotted accordingly, the local officers will promptly advise this office thereof; and will also report and identify any pending application for mineral patent affecting such subdivision which the agricultural applicant does not desire to contest. The surveyor-general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated, and directed to at once prepare, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-acre subdivision so made fractional by such mineral segregation,

designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(c) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applicants to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and receiver for submission to the commissioner of the general land office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated *as mineral* are in fact mineral in character; otherwise, in the absence of satisfactory showing in any such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

**Survey—Particulars to be observed.**

38. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well-defined place on the claim should be represented on the plat of survey and in the field-notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field-notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

| | Acres. |
|---|---|
| Total area of claim | 10.50 |
| Area in conflict with survey No. 302 | 1.56 |
| Area in conflict with survey No. 948 | 2.33 |
| Area in conflict with Mountain Maid lode mining claim, unsurveyed | 1.48 |

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field-notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

Survey of lode claims for patent: § 671.

**Posting plat and notice on claim—Contents of notice.**

39. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining

and conflicting claims as shown by the plat of survey. Too much care cannot be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

Posting notice and copy of plat on the claim: § 677.

A notice stating the wrong county is fatally defective. Wright v. Sioux Consolidated M. Co., 29 L. D. 154.

It is not necessary to give names of *all* adjoining and conflicting claims, but only such as are shown in the plat of survey. Lizzie Ellison, 29 L. D. 250; Gowdy v. Kismet G. M. Co., 24 L. D. 191; Id., 25 L. D. 216, 220.

**Filing of plat and field-notes—Proof of posting plat and notice.**

40. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field-notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

Initiatory proceedings in the land office: § 678.

Proof of posting of notice and plat: § 683.

**Proof of compliance with law.**

41. Accompanying the field-notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, state, or territory in which the claim lies, and with the mining laws of congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent. The vein or lode must be fully described,

the description to include a statement as to the kind and character of the mineral, the extent thereof, whether ore has been extracted and of what amount and value, and such other facts as will support the applicant's allegation that the claim contains a valuable mineral deposit.

Initiatory proceedings in land office: § 678.
Construed: Instructions, dated June 11, 1909, 38 L. D. 40.

**Copy of records and abstract of title.**

42. This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim certified by the legal custodian of the records of transfers, or by a duly authorized abstracter of titles. The certificates must state that no conveyances affecting, or purporting to affect, the title to the claim or claims appear of record other than those set forth.

Outside of the District of Alaska, the application for patent will be received and filed if the abstract is brought down to a day reasonably near the date of the presentation of the application and shows full title in the applicant who must as soon as practicable thereafter file a supplemental abstract brought down so as to include the date of the filing of the application. Publication will not be ordered until the showing as to title is thus completed and the local land officers are satisfied that full title was in the applicant on the day of the filing of the application.

In the District of Alaska the application for patent will be received and filed and the order for publication issued if the abstract showing full title in the applicant is brought down to a day reasonably near the date of the presentation of the application. A supplemental abstract of title brought down so as to include the date of the filing of the application must be furnished prior to the expiration of the sixty-day period of publication.

No certificate from an abstracter or abstract company will be accepted until approval by the commissioner of the general land office of a favorable report of the chief of field division,

or United States district attorney whose division or district embraces the lands in question, as to the reliability and responsibility of such abstracter or company. (As amended January 9, 1912.)

Subject discussed: § 687.
See Instructions, dated January 9, 1912, 40 L. D. 347.

**Lost records—Secondary evidence.**

43. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

Subject discussed: § 687.

**Land not subject to entry—Rejection of application.**

44. Before approving for publication any notice of an application for mineral patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the rules of practice. (As amended August 8, 1911.)

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of every such application embracing any portion of unsurveyed lands within such limits (except as to any

such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the act of February 26, 1895, without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company will be disposed of as provided by the first section of this paragraph, and the applicant afforded opportunity to protest and apply for a hearing or to appeal.

Notice should be given to the duly authorized representative of the railroad grantee, in accordance with Rule 17 of Practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad.

Evidence of service of notice should be filed with the record in each case.

Land must be clear on tract-books: § 679.
See Circular, dated August 8, 1911, 40 L. D. 222.

**Publication of notice of application—Agreement of publisher—Posting application in register's office.**

45. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for

sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

As this regulation stood prior to June 24, 1899, *ten* consecutive insertions in a weekly newspaper were required. This was held to be inconsistent with the law and of no force, since the sixty days' publication required by section 2325 of the Revised Statutes is complete when the notice has been inserted in *nine* successive issues. Davidson v. Eliza G. M. Co., 28 L. D. 224.

Designation of newspaper agreement of publisher: § 685.

**Contents of notice published and posted in register's office.**

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the *locus* of the claim by giving the connecting line, as shown by the field-notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

Contents of notice: § 677.

**Selection of newspaper for publication of notice.**

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

In the selection of the newspaper the register may exercise a reasonable discretion in determining what is a newspaper and which of several papers is the one published nearest the claim, keeping in view the purpose of the publication. He is not bound by geographical distance. Circ. Inst., 26 L. D. 145; Opie v. Auburn G. M. & M. Co., 29 L. D. 230. See, also, Condon v. Mammoth M. Co. (on review), 15 L. D. 330; Bretell v. Swift (on review), 17 L. D. 558; Tomay v. Stewart, 1 L. D. 570; In re Arnold, 2 L. D. 758.

See discussion of subject: § 685.

**Surveyor-general's certificate as to expenditures and correctness of plat and field-notes.**

48. The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is

required to file with the register a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several contiguous locations held in common, that an amount equal to five hundred dollars for each location has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field-notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises; and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof; provided, that as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient, and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

The rule stated in this section is upheld, explained and applied in the following decisions: Attorney-General's Op., 27 L. D. 91; In re Hale, 28 L. D. 524; Mayflower G. M. Co., 29 L. D. 7; Gillis v. Downey, Id. 83; Brady's Mortgagee v. Harris, Id. 89; B. P. O. E. M. Co., Id. 605; Nielson v. Champagne M. & M. Co., Id. 491; In re Schlessinger, Id. 495; Tenderfoot and Other Lodes, 30 L. D. 200.

Surveyor-general's certificate discussed: § 673.

**Same—Source of surveyor-general's information.**

49. The surveyor-general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who makes the actual survey and examination upon the premises, and such mineral surveyor should specify with particularity and full detail the character and extent of such improvements, but further or other evidence may be required in any case.

Subject discussed: § 673.

**Surveyor-general's certificate—Indorsement on plat and field-notes.**

50. It will be convenient to have this certificate indorsed by the surveyor-general, both upon the plat and field-notes of survey filed by the claimant as aforesaid.

Subject discussed: § 673.

**Proof of publication of notice and that plat and notice remained posted on claim.**

51. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

Proof of publication of notice: § 690.
Proof that plat and notice remained posted on claim: § 692.

**Payment for claim—Duplicate receipt—Statement of fees and charges.**

52. Upon the filing of this affidavit the register will, if no adverse claim was filed in this office during the period of publication, and no other objection appears, permit the claimant to pay for the land to which he is entitled at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the commissioner of the general land office and a patent issued thereon if found regular.

Payment for land and issuance of duplicate receipt: § 694.
Statement of fees and charges: § 693.

**Protesting patent—Cannot take place of adverse claim—May be made by excluded co-owners.**

53. At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in a matter essential to a valid entry under the patent proceedings. Such protest cannot, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issue of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a co-owner excluded from an application for patent does not have an "adverse" claim within the meaning of sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six of the Revised Statutes. See Turner v. Sawyer, 150 U. S. 578–586.

Distinction between protest and adverse claim: § 712.
Hearing on character of land initiated by protest: §§ 689, 717.

**Application for patent by trustee—Citizenship of beneficiaries.**

54. Any party applying for patent as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

Subject discussed: § 684.

**Annual expenditure solely a matter between rival claimants—Question exclusively for courts.**

55. The annual expenditure of one hundred dollars in labor or improvements on a mining claim required by section twenty-

three hundred and twenty-four of the Revised Statutes is solely a matter between rival or adverse claimants to the same mineral land and goes only to the right of possession, the determination of which is committed exclusively to the courts.

Cain v. Addenda M. Co., 29 L. D. 62, 66; Wollenberg et al., Id. 302; Barklage v. Russell, Id. 401.

**Waiver of rights by failure to prosecute application to completion within reasonable time.**

56. The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land within a reasonable time after the expiration of the period of publication of notice of application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

See note to preceding paragraph.

**Completion of application after determination of adverse claim or protest.**

57. The proceedings necessary to the completion of an application for patent to a mining claim against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

See note to paragraph 55.

## PLACER CLAIMS.

**Patent proceedings generally same as for lode claims.**

58. The proceedings to obtain patents for placer claims, including all forms of mineral deposits, excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and con-

forms to legal subdivisions, no further survey or plat will be required. Where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

Patent proceedings for lode claims: §§ 699–704.

**Same.**

59. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

See text, § 699.

**Specification in application for patent of all lodes claimed—Examination and report of deputy surveyor.**

60. In placer applications, in addition to the recitals necessary in and to both vein or lode and placer applications, the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation and that title is sought not to control watercourses or to obtain valuable timber but in good faith because of the mineral therein. This statement, of course, must depend upon the character of the deposit and the natural features of the ground, but the following details should be covered as fully as possible: If the claim be for a deposit of placer gold, there must be stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold. If it be a building-stone or other deposit than gold claimed under the placer laws, he must describe

fully the kind, nature, and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim. He will also be required to describe fully the natural features of the claim; streams, if any, must be fully described as to their course, amount of water carried, fall within the claim; and he must state kind and amount of timber and other vegetation thereon and adaptability to mining or other uses.

If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placer and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section twenty-three hundred and thirty-three, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

While this data is required as a part of the mineral surveyor's report under paragraph one hundred and sixty-seven, in case of placers taken by special survey, it is proper that the application for patent incorporate these facts under the oath of the claimant.

Inasmuch as in case of claims taken by legal subdivisions, no report by a mineral surveyor is required, the claimant, in his application in addition to the data above required, should describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the course and distance thereof to the nearest corner of the public surveys.

As prescribed by paragraph twenty-five, this statement as to the description and value of the improvements must be corroborated by the affidavits of two disinterested witnesses.

Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to proof as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

Local land officers are instructed that if the proofs submitted in placer applications under this paragraph are not satisfactory as showing the land as a whole to be placer in character, or if the claims impinge upon or embrace watercourses or bodies of water, and thus raise a doubt as to the *bona fides* of the location and application, or the character and extent of the deposit claimed thereunder, to call for further evidence, or if deemed necessary, request the specific attention of the chief of field service thereto in connection with the usual notification to him under the circular instructions of April 24, 1907, and suspend further action on the application until a report thereon is received from the field officer.

Proof that no known lodes exist within placer applied for: § 703.
Application for lodes within placer: § 704.
Descriptive report of surveyor: §§ 672, 702.

## MILLSITES.

### Must be shown to be nonmineral.

61. Land entered as a millsite must be shown to be nonmineral. Millsites are simply auxiliary to the working of mineral claims, and as section twenty-three hundred and thirty-seven, which provides for the patenting of millsites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

Manner of acquiring patent to millsite: § 708.
Millsite generally: §§ 519–524.

### Millsite included in application for lode patent—Independent application.

62. To avail themselves of this provision of law parties holding the possessory right to a vein or lode claim, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section twenty-three hundred and thirty-seven, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner

already set forth herein, which application, together with the plat and field-notes, may include, embrace, and describe, in addition to the vein or lode claim, such noncontiguous millsite, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a millsite if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

See note to preceding paragraph.

**Survey of millsite included in lode application—Posting of plat and field-notes on millsite.**

63. Where the original survey includes a lode claim and also a millsite the lode claim should be described in the plat and field-notes as "Sur. No. 37, A," and the millsite as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the millsite to a corner of the lode claim to be invariably given in such plat and field-notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the millsite as well as upon the vein lode claim for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the millsite, but the whole area of both lode and millsite will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and millsite claim.

See note to paragraph 61.

**Application by owner of quartz-mill or reduction works.**

64. In case the owner of a quartz-mill or reduction works is not the owner or claimant of a vein or lode claim, the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his millsite at said price per acre.

See note to paragraph 61.

**Proof of nonmineral character of land.**

65. In every case there must be satisfactory proof that the land claimed as a millsite is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

See note to paragraph 61.

CITIZENSHIP.

**Proof of citizenship.**

66. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

Proof of citizenship: § 684.
Citizens generally: §§ 223–227.
Who are citizens: § 224.
Citizenship of domestic corporations: § 226.
Citizenship, how proved: § 227.
Aliens, generally: §§ 231–234.
General property rights of aliens in the states: §§ 237, 238.
General property rights of aliens in the territories: §§ 242–244.

**Same—Individuals or associations not appearing by agent.**

67. In case of an individual or an association of individuals who do not appear by their duly authorized agent, the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence will be required.

See note to preceding paragraph.

**Proof of declaration of intention to become citizens.**

68. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

See note to paragraph 66.

**Affidavit of citizenship—Before whom taken.**

69. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land districts; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any state or territory.

See note to paragraph 66.

**Same.**

70. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place, before any person authorized to administer oaths, and whose official character is duly verified.

See note to paragraph 66.

**Allowance of entry—Transfers pending application for patent.**

71. No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made, pending the application for patent.

Transfers by or to aliens: § 233.

**Consecutive series of mineral entries.**

72. The mineral entries will be given the current serial numbers according to the provisions of the circular of June 10, 1908, whether the same are of lode or of placer claims or of millsites.

Numbering of millsite surveys: § 708.

**Transmission of papers by register—Certificate of posting in register's office—Preservation of plat in mails.**

73. In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The schedule of papers, Form 4–2528, should accompany the returns with all mineral applications and entries allowed.

Certificate of posting in register's office: § 691.

POSSESSORY RIGHT.

**Burden of proof as affected by section twenty-three hundred and thirty-two, Revised Statutes.**

74. The provisions of section twenty-three hundred and thirty-two, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

This paragraph is quoted, explained, and applied in Barklage v. Russell, 29 L. D. 401, 405.

**Proof of possessory right.**

75. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the state or territory, together

with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim.

Proof of title by possession: § 688.
Barklage v. Russell, 29 L. D. 401.

**Same—Certificate of court.**

76. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the state or territory as aforesaid, other than that which has been finally decided in favor of the claimant.

Subject discussed: § 688.
Barklage v. Russell, 29 L. D. 401.

**Same—Corroborative testimony.**

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

Subject discussed: § 688.
Barklage v. Russell, 29 L. D. 401.

## ADVERSE CLAIMS.

### Filing—Verification.

78. An adverse mining claim must be filed with the register and receiver of the land office where the application for patent was filed, or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

Where adverse claim must be filed: § 739.
Verification of adverse claim: § 736.

### Verification by agent or attorney.

79. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

Verification of adverse claim: § 736.

### Place of verification by agent or attorney.

80. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

See *ante*, § 736.

### Contents of adverse notice.

81. The adverse claim so filed must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he

claims as a locator, he must file a duly certified copy of the location from the office of the proper recorder.

Subject discussed in text: § 734.

**Plat and survey of adverse claim.**

82. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict; provided, however, that if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.

Subject discussed in text: § 735.

**Notice of adverse claim by register.**

83. Upon the foregoing being filed within the sixty days' period of publication, the register, or in his absence, the receiver, will immediately give notice in writing to *the parties* that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived and the application for patent be allowed to proceed upon its merits.

**Date of filing indorsed on adverse claim—Record of notification—Proceedings in land office suspended.**

84. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued

thereon; and thereafter all proceedings on the application for patent will be stayed with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

When adverse claim must be filed: § 738.
Filing of adverse claim suspends powers of land department: § 739.

**Filing certified copy of judgment in land office.**

85. Where an adverse claim has been filed, and suit thereon commenced within the statutory period, and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section twenty-three hundred and twenty-six, Revised Statutes.

The judgment and its effect: §§ 763–766.

**Proof of dismissal of suit on adverse claim.**

86. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

Subject referred to in text: § 759.

**Proof of abandonment of adverse claim.**

87. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

**Proof of failure to commence suit on adverse claim.**

88. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the state

court having jurisdiction in the case, and also by the clerk of the district court of the United States for the district in which the claim is situated, will be required. (As amended November 6, 1912.)

Time within which action must be commenced: § 756.
Action, when deemed commenced: § 757.

## APPOINTMENT OF DEPUTIES FOR SURVEY OF MINING CLAIMS—CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS AND RECEIVERS, ETC.

### Maximum charges for newspaper publications.

89. Section twenty-three hundred and thirty-four provides for the appointment of surveyors to survey mining claims, and authorizes the commissioner of the general land office to establish the rates to be charged for surveys and for newspaper publications in mining cases. Under this authority of law the following rates have been established as the maximum charges for newspaper publications:

(1) The charge for the publication of notice of application for patent in a mining case, in all districts, exclusive of Alaska, shall not exceed the legal rates allowed by the laws of the state, wherein the notice is published, for the publication of legal notices, and in no case shall the charge exceed seven dollars for each ten lines of space occupied, where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication, five dollars shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for legal notices.

(2) For the publication of citations in contests or hearings involving the character of lands the charges may not exceed the rates provided for similar notices by the law of the state,

and shall not exceed eight dollars for five publications in a weekly newspaper or ten dollars for publication in a daily newspaper for thirty days. (As amended June 23, 1913, 42 L. D. 204.)

Subject discussed: § 685.

**Deputy surveyors—Appointment—Expenses—Bond.**

90. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many competent surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States deputy surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into a bond of not less than five thousand dollars for the faithful performance of his duties.

Surveyors-general and their deputies: § 661.
The survey for patent: §§ 670–673.

**Deposit to cover expenses in surveyor-general's office.**

91. With regard to the platting of the claim and other office work in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depositary in favor of the United States treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

Subject discussed in text: § 670.

**Deputy surveyor to be appointed in each mining district.**

92. The surveyors-general will endeavor to appoint surveyors to survey mining claims, so that one or more may be

located in each mining district, for the greater convenience of miners.

Surveyors-general and their deputies: § 661.

**Cessation of surveyor's duties—Not permitted to act as attorney.**

93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field-notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

See text, § 661.

**Excessive charges by surveyor or publisher.**

94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

Fees of deputy surveyor: § 670.
Fees of publisher: § 685.

**Fees of register and receiver.**

95. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Rev. Stats., § 2238, par. 9.)

See text, § 678.

There is nothing mandatory in the statute as to time of payment of fees of register and receiver, and an adverse claim received by the local

officers within the required period is valid, though the fees are not paid until after the expiration of such period. Blake v. Toll, 29 L. D. 413.

[Paragraphs 96, 97 and 98 are superseded by the general circular instructions of June 10, 1908 (37 L. D. 46).]

HEARINGS TO DETERMINE CHARACTER OF LANDS.

**Rules of practice of land office to govern.**

99. The rules of practice in cases before the United States district land offices, the general land office, and the department of the interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of lands.

Hearings to determine character of land: §§ 107, 207, 679, 717.

**Burden of proof on agricultural claimant as to land returned by surveyor-general as mineral.**

100. Public land returned by the surveyor-general as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described.

*Prima facie* character of surveyor-general's return: §§ 106, 679.

**Proof of character of land in different kinds of hearings.**

101. Hearings to determine the character of lands are practically of two kinds, as follows:

(1) Lands returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is not required,

notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the lands submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

See notes to two preceding paragraphs.

[Paragraphs 102 to 104, inclusive, are superseded by appropriate instructions relative to nonmineral proofs in railroad, state, and forest lieu selections contained in separate circulars.]

**Examination of witnesses as to character of land.**

105. At hearings to determine the character of lands the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purpose; upon

what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all. In every case, where practicable, an adequate quantity or number of representative samples of the alleged mineral-bearing matter or material should be offered in evidence, with proper identification, to be considered in connection with the record, with which they will be transmitted upon each appeal that may be taken. Testimony may be submitted as to the geological formation and development of mineral on adjoining or adjacent lands and their relevancy.

Mineral lands and kindred terms defined: §§ 85–98.
See, also, §§ 137–140, 207, 336.

**Same.**

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

See note to preceding paragraph.

**Same.**

107. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of minerals were first known to exist on the lands.

See note to paragraph 105.

**Method of segregating mineral from agricultural land—Survey.**

108. When the case comes before this office such decision will be made as the law and the facts may justify; in cases

where a survey is necessary to set apart the mineral from the agricultural land, the proper party *at his own expense* will be required to have the work done, by a surveyor to be designated by the surveyor-general; application therefor must be made to the register and receiver, accompanied by a description of the land to be segregated, and the evidence of service upon the opposite party of notice of his intention to have such segregation made; the register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section twenty-three hundred and twenty, Revised Statutes, as to length and width and parallel end-lines.

**Same—Verification of survey.**

109. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, United States commissioner, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

**Same—Copies of plat and description to be furnished by surveyor-general.**

110. Upon the filing of the plat and field-notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will furnish authenticated copies of such plat and description both to the proper local land office and to this office, made upon the usual drawing-paper township blank.

The copy of plat furnished the local office, and this office, must be a diagram verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each forty-acre legal subdivision by the proper lot number, beginning with number 1 in

each section, and giving the area of each lot, the same as provided in paragraph thirty-seven in the survey of mining claims on surveyed lands.

**Patent to be obtained as in other cases after mineral character of land established—Blank forms.**

111. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the general land office.

## Territory of Alaska.

**Mining rights of Canadian citizens.**

112. Section 13, act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" in the District of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest territory, by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

Act referred to in text: § 243.

**Reference to Alaska mining laws.**

113. For the sections of the act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the District of Alaska, and for the exploration and mining of tide lands

and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 21 of this circular.

Act referred to in text: § 243.

Since these regulations were adopted, Alaska has been given legislative powers. A full discussion of the mining laws applicable to this territory will be found in this Appendix under the head of "Alaska," *post.*

## MINERAL LANDS WITHIN FOREST RESERVES.

### Subject to entry under mining laws—Use of timber and stone by settlers.

114. The act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

The act also provides that "the secretary of the interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the state or territory respectively, where such reservations may be located."

### Transfer of national forests.

Act of February 1, 1905 (33 Stat. 628).

The secretary of the department of agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for

other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

(For further information see Use Book and various national forest manuals issued by the forest service.)

For instructions relating to mining rights situated in national forests, see *post*, subdivision XI.

Forest reservations: § 197.

*Status* of mining claims within forest reservations: § 198.

## SURVEY OF MINING CLAIM—GENERAL PROVISIONS.

### Appointment.

115. Under section twenty-three hundred and thirty-four, Revised Statutes, the United States surveyor-general "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

See text, § 661.

### Same—Applications.

116. Persons desiring such appointments should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary.

### Same—Approval of commissioner.

117. All appointments of mineral surveyors must be submitted to the commissioner of the general land office for approval.

### Revocation of commissions of deputy surveyors.

118. The surveyors-general have authority to suspend or revoke the commissions of deputy mineral surveyors for cause.

Before final action, however, the matter should be submitted to the commissioner of the general land office for approval.

See text, § 661.

**Same—Appeal to general land office.**

119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the general land office.

**Fees of deputy surveyor matter of private contract.**

120. Neither the surveyor-general nor the commissioner of the general land office has jurisdiction to settle differences, relative to the payment of charges for field-work, between mineral surveyors and claimants. These are matters of private contract, and must be enforced in the ordinary manner, i. e., in the local courts. The department has, however, authority to investigate charges affecting the official actions of deputy mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

**Number of deputy surveyors appointed.**

121. The surveyors-general should appoint as many competent mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

**Charges for office work—Amended surveys.**

122. The schedule of charges for office work should be as low as possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. [Omitted from Regulations approved March 29, 1909.]

**Correspondence of mineral surveyor with surveyor-general.**

124. Mineral surveyors will address all official communications to the surveyor-general. They will, when a mining claim

is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject matter and date of the letter. They will promptly notify the surveyor-general of any change in postoffice address.

**Mineral surveyor's records—Field-notes and reports.**

125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field-notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field-notes and other reports must be written in a clear and legible hand or typewritten, in noncopying ink, and upon the proper blanks furnished gratuitously by the surveyor-general's office upon application therefor. No interlineations or erasures will be allowed.

**Mineral surveyor's return—Signature—Authority for survey.**

126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States deputy mineral surveyor, and made in pursuance of a special order from the surveyor-general's office. After he has received an order for survey he is required to make the survey and return correct field-notes thereof to the surveyor-general's office without delay.

**Fees of surveyor to be paid by claimant.**

127. The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

See text, § 670.

**Mineral surveyor not to act as attorney or notary public for claimant.**

128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His

duty in any particular case ceases when he has executed the survey and returned the field-notes and preliminary plat, with his report, to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest. It is preferable that both preliminary and final oaths of assistants should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense, or inconvenience would result from a strict compliance with this rule, the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper surveyor-general a full written report of the circumstances which required his stated action; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will not employ chainmen interested therein in any manner.

See text, § 661.

SURVEY—HOW MADE.

**Actual survey on the ground—Mere calculations insufficient.**

129. The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term *survey* in this paragraph applies not only to the usual field work, but also to the exam-

inations required for the preparation of affidavits of five hundred dollars' expenditure, descriptive reports on placer claims, and all other reports.

**One survey for contiguous locations—Separate boundaries for each.**

130. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

See text, § 671.

**Survey to conform to location or differences noted.**

131. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field-notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

See text, § 671.

**Corners of location not to be changed.**

132. In view of the principle that courses and distances must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field-notes.

See text, § 671.

**Surface area of mining claim—Course of vein.**

133. No mining claim located subsequent to May 12, 1872, should exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50–100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

Surface area, length, and width of claims: § 361.
Discovery point center of vein if not otherwise specified: § 362.

**Solar attachment on transit—Courses referred to true meridian.**

134. All mineral surveys must be made with a transit with or without solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing, the survey must be connected with some line the true course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

**Claim to be connected with corner of public survey or mineral monument.**

135. Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument. If both are within the required distance, the connection must be with the corner of the public survey.

See text, § 671.

**Surveys in suspended township—Mineral monument.**

136. Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release of the township from suspension, the position of the claim can be shown on the plat.

**Same.**

137. A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

**Tying to public survey and mineral monuments.**

138. In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or location monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and location monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey. When a boundary line of a claim intersects a section line, courses and distances from point of intersection to the government corners at each end of the half mile of section line so intersected must be given.

**Establishing mineral monument.**

139. In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction.

**Site for mineral monument.**

140. The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

**Dimensions and material of mineral monument.**

141. The monument should consist of a stone not less than thirty inches long, twenty inches wide, and six inches thick, set halfway in the ground, with a conical mound of stone four feet high and six feet base alongside. The letters U. S. L. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post eight feet long, six inches square, set three feet in the ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than three feet high and six feet base around it, may be used. The exact point for connection must be indicated on the monument by an × chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

**Bearings, description, and map of mineral monument.**

142. From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the location monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the locating monument, with a topographical map of its location, should be furnished the office of the surveyor-general by the surveyor.

**Location monuments.**

143. Corners may consist of—

*First.*—A stone at least twenty-four inches long set twelve inches in the ground, with a conical mound of stone one and one-half feet high, two feet base, alongside.

*Second.*—A post at least three feet long by four inches square, set eighteen inches in the ground and surrounded by a substantial mound of stone or earth.

*Third.*—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

**Same.**

144. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used, its dimensions above ground must be stated and a cross chiseled at the exact corner point.

**Surveyor's witness corner.**

145. In case the point for the corner be inaccessible or unsuitable, a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field-notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

**Bearings of corners.**

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other

objects, as prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

**"Tying" to corners of official survey of another claim.**

147. If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined, and actually established upon the ground. The mineral surveyor will fully and specifically state in his return *how* and by what *visible evidences* he was able to identify on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

**Topography of claim.**

148. The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

**Conflicting surveys—Corners of.**

149. If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and

distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field-notes; provided, that where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

**Lode and millsite in one survey—Corners.**

150. A lode and millsite claim in one survey will be distinguished by the letters A and B following the number of the survey. The corners of the millsite will be numbered independently of those of the lode. Corner No. 1 of the millsite must be connected with a corner of the lode claim as well as with a corner of the public survey or United States location monument.

See text, § 708.

**Lodes within placer—Contiguous placer and lode locations as one claim—Corners.**

151. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with corner No. 1 in each case.

See text, § 704.

**Description of survey—Names of locations reference to which is made.**

152. Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

**Area of location—Area of conflicts.**

153. The total area of each location and also the area in conflict with each intersecting survey or claim should be

stated. But when locations embraced in one survey conflict with each other such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

**Statement of whether claim is on surveyed or unsurveyed land.**

154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

**Title-page of field-notes.**

155. The title-page of the field-notes must contain the post-office address of the claimant or his authorized agent.

**Certificate of value of improvements—What to include.**

156. In the mineral surveyor's certificate of the value of the improvements all *actual* expenditures and *mining* improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

See text, § 673.

**Same.**

157. The expenditures required may be made from the surface or in running a tunnel, drifts, or crosscuts for the development of the claim. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of, and actually facilitate the extraction of mineral from, the claim.

See text, § 673.

**Description of improvements.**

158. All mining and other improvements claimed will be located by courses and distances from corners of the survey,

or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1. Improvements made upon other locations, or by a former locator who has abandoned the claim, cannot be included in the estimate, but should be described and located in the notes and plat.

See text, § 673.

**Lode and millsite claim—Expenditure on lode claim.**

159. In case of a lode and millsite claim in the same survey the expenditure of five hundred dollars must be shown upon the lode claim.

**Proof of expenditure supplemental to survey.**

160. If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the surveyor-general supplemental proof showing five hundred dollars' expenditure made prior to the expiration of the period of publication.

**Preliminary plat to be returned by surveyor.**

161. The mineral surveyor will return with his field-notes a preliminary plat on blank sent to him for that purpose, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

**Report of error in survey—Joint survey.**

162. Whenever a survey has been reported in error the surveyor who made it will be required to promptly make a thorough examination upon the premises and report the result, under oath, to the surveyor-general's office. In case he finds his survey in error he will report in detail all discrepancies with the original survey and submit any explanation he may

have to offer as to the cause. If, on the contrary, he should report his survey correct, a joint survey will be ordered to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order, unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be *a joint* and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

**Same—Field-notes of joint survey.**

163. The mineral surveyor found in error, or, if both are in error, the one who reported the same, will make out the field-notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the surveyor-general's office.

**Amended surveys—Special instruction.**

164. Inasmuch as amended surveys are ordered only by special instructions from the general land office, and the conditions and circumstances peculiar to each separate case, and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject matter to be embraced in the field-notes thereof, but few general rules applicable to all cases can be laid down.

**Amended survey—Conformity to original.**

165. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in the field-notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

**Amended survey—Field-notes.**

166. The field-notes of the amended survey must be prepared on the same size and form of blanks as are the field-notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field-notes.

**Placer claims—Descriptive report—Contents—Corroboration.**

167. Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field-notes a descriptive report, in which will be described—

(*a*) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(*b*) The *locus* and size of streams, and such other matter as may appear upon the surface of the claims.

(*c*) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them.

(*d*) The proximity of centers of trade or residence.

(*e*) The proximity of well-known systems of lode deposits or of individual lodes.

(*f*) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(*g*) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(*h*) The true situation of all mines, salt licks, salt springs, and millsites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(*i*) Said report must be made under oath and duly corroborated by one or more disinterested persons.

See text, § 672.

**Employment of interested party in making surveys prohibited.**

168. The employing of claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims, will not be allowed.

**Errors to be corrected at surveyor's expense—Surveyor's accountability.**

169. The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

S. V. PROUDFIT,
Acting Commissioner.

Approved March 29, 1909.

R. A. BALLINGER,
Secretary.

## VIII. COAL LAND LAW WITH REGULATIONS THEREUNDER.

**Coal lands, who may enter—Size of location—Price.**

§ 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent

authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Classification of coal as mineral, and characteristics of system: § 495.
Rules for determining character of land: § 496.
Who may enter coal lands: § 501.
Different classes of entries: § 502.
Private entry: § 503.
Declaratory statement: § 505.
Purchase price: § 507.

**Preferential rights of purchase.**

§ 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved; provided, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Preferential right to purchase discussed in text: § 504.

**Declaratory statement, when filed.**

§ 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been

made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Declaratory statement: § 505.

**One person shall make but one entry.**

§ 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons, and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Limitation to one entry: § 501.
Purchase price: § 507.
Final entry: § 508.

**Conflicting claims.**

§ 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by

legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The commissioner of the general land office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

**Application of preceding sections.**

§ 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

Coal land laws extended to Alaska: 31 Stats. at Large, 658.
See laws applicable to Alaska, *post*.

## RULES AND REGULATIONS OF LAND DEPARTMENT.

Under the authority conferred by said section twenty-three hundred and fifty-one the following rules and regulations are issued for carrying into effect the provisions of said law:—

The main body of these regulations were adopted April 12, 1907 (35 L. D. 665), and have been amended from time to time since that date, as noted under the respective sections so amended.

**Classes of entries.**

1. Sale of coal lands is provided for—

(a) By ordinary *cash entry* under section twenty-three hundred and forty-seven.

(b) By *cash entry* under a *preference* right to purchase acquired by compliance with the provisions of section twenty-three hundred and forty-eight.

Classes of entries: § 502.
Private entry: § 503.
Preferential right of purchase: § 504.

**Entry by legal subdivisions—Land subject to entry.**

2. Coal lands may be entered only after survey and by legal subdivisions. The lands must be vacant and unappropriated and must contain workable deposits of coal and

must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

**Who may enter.**

3. Entry by an individual may be made only by a person above the age of twenty-one years who is a citizen of the United States or has declared his intention to become such, and shall not embrace more than one hundred and sixty acres. Entry by an association of persons may embrace three hundred and twenty acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal land law.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than five thousand dollars in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Who may enter coal lands: § 501.

**Only one entry allowed.**

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law may enter or hold any other coal lands thereunder. The right so to enter or hold is exhausted whether an entry embraces in any instance the maximum area allowed by the law or less; also by the acquisition of a preference right of entry unless sufficient cause for the abandonment thereof is shown. Assignment of a preference right of entry under section twenty-three hundred and forty-eight, Revised Statutes, will not hereafter be recognized.

**Text: § 501.**

**Prices at which land may be purchased.**

6. Information will be furnished registers and receivers by the commissioner of the general land office of the price at which all coal lands in their respective districts will be offered. The local land officers will from time to time be furnished with schedules and maps (1) showing lands known to lie without ascertained coal areas and open to entry under the general land laws, according to the character of each particular tract; (2) showing lands known to contain workable deposits of coal, whereon prices will be fixed upon information derived from field examination; and (3) showing lands containing coal of such character as may, from their location at a distance from transportation lines, be sold at the minimum price fixed by the statute as hereinafter stated.

Local land officers will allow *coal* entries for lands in the first and third classes at the minimum price fixed by the statute, and for those in the second class at the prices stated in the schedules and maps furnished them. Lands listed in classes 2 and 3 are subject to entry under the coal land laws only, unless shown by the applicant to be of such character as to be subject to entry under some other law. For those lands listed as of the first and third classes (when entered under the coal land laws) the price is not less than ten dollars per acre when situated more than fifteen miles from a completed railroad and twenty dollars when situated within fifteen miles of a completed railroad; and where the lands lie partly without such limit, the higher price must be paid for each smallest legal subdivision the greater part of which lies within fifteen miles of such railroad. The term "completed railroad" is construed to mean a railroad *actually constructed, equipped,* and *operating* at the date of entry. The distance is to be calculated from the point on such railroad nearest the lands applied for, and the facts in each case must be shown by the affidavit of the applicant, corroborated by the affidavit of some disinterested credible person having actual knowledge thereof.

Purchase price: § 507.

**Preference right of entry.**

7. A preference right of entry accrues only where a person or association of persons, severally qualified, have opened and improved a coal mine or mines upon the public lands and shall be in actual possession thereof and not by the filing of a declaratory statement. A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must be in fact opened and improved on the land claimed.

There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of the coal, or beyond the *opening* and *improving* of the mine as a condition precedent to a preference right under section twenty-three hundred and forty-eight of the Revised Statutes. To preserve a preference right of entry specified in the statute the person or association of persons having acquired the same must present to the register of the proper land district, within sixty days from the date of actual possession and commencement of improvements upon the land, a declaratory statement therefor in all cases where the township plat has been filed. When the township plat is not on file at the date of such improvement such declaratory statement must be presented within sixty days from the receipt of such plat at the district land office.

Preference right of entry: § 504.

**Protests.**

8. After entry has been allowed the local officers have no authority to order a hearing or make further determination with respect to it, except upon instructions from the general land office. They will, however, receive all protests against it and promptly forward them, together with a statement of the facts shown by their records, for consideration and action.

9. Prior to entry it is competent for the local officers to order a hearing on sufficient grounds set forth under oath by any protestant.

Protests and hearings: § 508.

**Application for private entry—Form.**

10. When it is sought to purchase otherwise than in the exercise of a preference right the party will himself make oath to the following application, which must be presented to the register:

I, —— ——, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the —— quarter of section ——, in township —— of range ——, in the district of lands subject to sale at the land office at ——, and containing —— acres; and I solemnly swear that no portion of said tract is in the possession of any other party or parties who has or have commenced improvements thereon for the development of coal; that I am twenty-one years of age; a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held, except —— or purchased any lands under said act, either as an individual or as a member of an association; that I make this application in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any other person or persons whomsoever; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not to my knowledge within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

Application for private entry: § 503.

**Application for preference entry—Form.**

11. Where a preference right of entry is sought to be preserved the required declaratory statement must be substantially as follows:

I, —— ——, do hereby declare my intention to purchase, in the exercise of a preference right, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the —— quarter of section —— of township ——of range ——, in the district of the lands subject to sale at the district land office at ——; and I do solemnly swear that I am —— years of age and a citizen of the United States (or have declared my intention to become a citizen of the United States); that I have never, either as an individual or as a member of an association, held, except —— or purchased any coal lands under the aforesaid provisions of the Revised Statutes; that I was in possession of, and commenced improvements on, said tract on the —— day of ——, A. D. 19—, and have ever since remained in actual possession continuously; that I have opened and improved a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of —— dollars, the labor and improvements being as follows: (Here describe the nature and character of the improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described land and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

Preferential entry: § 504.

**Proof and payment—Time for—Notice.**

12. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but the local officers will allow no party to make final proof and payment except on special written notice to all others who appear on their records as claimants to the same tract. No notice will be given

to parties whose declaratory statements have expired by limitation under the law.

Proof and payment: § 508.

**Same.**

13. A declarant will not be permitted to file after the expiration of the sixty days allowed nor to exercise a preference right of purchase after the expiration of the year.

**Purchase in exercise of preference right—Affidavit.**

14. When it is sought to purchase, in the exercise of preference right, the applicant must himself make the following affidavit, which must be presented to the register:

I, —— ——, claiming, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the preference right to purchase the —— quarter of section ——, in township —— of range ——, subject to sale at the district land office at ——, hereby apply to purchase and enter the same; and I do solemnly swear that I have not hitherto held, except —— or purchased, either as an individual or as a member of an association, any coal lands under the aforesaid provisions of the law; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of —— dollars, the nature of such improvements being as follows: —— ——; that I am now in the actual possession of said mines, and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge,

any valuable deposits of gold, silver, or copper. So help me God.

Text: § 505.

**Association entry—Affidavit.**

15. Where purchase and entry, whether in the exercise of a preference right or otherwise, is made by an association, each member thereof must subscribe and swear to the application or affidavit, the necessary changes being made to cover the joint possession and expenditure and the purchase and entry in their joint interest.

**Verification.**

16. Each application, declaratory statement, and affidavit, forms whereof are given above, must be verified before the register or receiver or some officer authorized by law to administer oaths in the land district wherein the lands involved are situate. (Amendment of April 29, 1908.)

**Notice of application—Publication.**

17. Upon the filing of an application to purchase coal lands under the provisions of paragraphs ten or fourteen the applicant will be required, at his own expense, to publish a notice of said application in a newspaper nearest the lands, to be designated by the register, for a period of thirty days, during which time a similar notice must be posted in the local land office and in a conspicuous place on the land. The notice should describe the land applied for and state that the purpose thereof is to allow all persons claiming the land applied for, or desiring to show that the applicant's coal entry should not be allowed for any reason, an opportunity to file objections with the local land officers.

Publication must be made sufficiently in advance to permit entry within the year specified by the statute.

**Same—Proof of publication.**

18. After the thirty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement (including an attached copy of the

published notice) that the notice was published for the required period, giving the first and last date of such publication, and his own affidavit, or that of some credible person having personal knowledge of the fact, showing that the notice aforesaid remained conspicuously posted upon the land sought to be patented during said thirty days' publication, giving the dates. The register shall certify to the fact that the notice was posted in his office for the full period of thirty days, the certificate to state distinctly when such posting was done and how long continued, giving the dates.

The claimant will be required within thirty days after the expiration of the period of newspaper publication to furnish the proofs specified in this paragraph, whereupon, and after receipt of report of chief of field division, as required in paragraphs five and six of circular approved April twenty-four, nineteen hundred and seven, the register and receiver will examine the proofs submitted, and if all be found regular and the application allowable, will, by registered mail or personal service, so notify the applicant in writing, requiring him, within fifteen (15) days from receipt of notice of such allowance, to make payment of the purchase money unless it has theretofore been made. Should the specified proofs and purchase money be not furnished and tendered within the time prescribed, the local officers will reject the application subject to appeal. In the exercise of a preference right of purchase, the publication and posting of notice should be completed and the proof thereof filed within the year fixed by the statute.

Applicants to purchase under section twenty-three hundred and forty-seven of the Revised Statutes may at their option pay for the land at the time of filing their applications to purchase, or at any time thereafter, up to fifteen days from and after receipt of notice from the register and receiver, as hereinbefore provided. The price to be paid will be that existent at date of actual payment of the purchase money by the applicants to the register and receiver, and a subsequent increase in the price will not affect their right to complete the applications, if proceedings be diligently prosecuted to final proof

and entry. Where payments are not made at time of filing applications to purchase, but are deferred to a later date, and an increase in valuation has occurred subsequent to application to purchase, but before the actual tender and payment of the purchase money, the applicants will in all such cases be required to pay the new or higher price.

The foregoing is not applicable to coal land claimants who have initiated claims under section twenty-three hundred and forty-eight of the Revised Statutes by the opening and improving of a mine of coal on public land and who have diligently prosecuted their claims to completion as required by the law and regulations. Such claimants will be required to pay the price fixed and existent at the time of the initiation of their claims.

Amendments of November 30, 1907 (36 L. D. 192), and December 30, 1912 (41 L. D. 417). See, also, Instructions of December 30, 1912 (41 L. D. 416).

**Notice for publication—Forms.**

19. Of the following forms, the one appropriate to the sections of the Revised Statutes under which application is made should be used for publication of all notices of application to enter coal lands:

*Notice for Publication.*

COAL ENTRY.

(Sec. 2347, R. S.)

—— —— Land Office,

—— ——, 19—.

Notice is hereby given that —— ——, of ——, county of ——, state of ——, has this day filed in this office his application to purchase, under the provisions of section twenty-three hundred and forty-seven, United States Revised Statutes, the —— of section No. ——, township No. ——, range No. ——.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by the applicant, should file their affidavits of protest in this office during the thirty day period of publication immediately

following the first printed issue of this notice, otherwise the application may be allowed.

—— ——,
Register.

*Notice for Publication.*

COAL ENTRY.

(Secs. 2348–52, R. S.)

—— —— Land Office,
——— ——, 19—.

Notice is hereby given that —— ——, of ——, county of ——, state of ——, who, on the —— day of ——, 19—, filed in his office his coal declaratory statement for the —— of section No. ——, township No. ——, range No. ——, has this day filed in this office his application to purchase said land under the provisions of sections twenty-three hundred and forty-eight to twenty-three hundred and fifty-two, United States Revised Statutes.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by applicant, should file their affidavits of protest in this office during the thirty day period of publication immediately following the first printed issue of this notice.

—— ——,
Register.

As amended July 9, 1912 (40 L. D. 100).

Paragraph 20 has been vacated and superseded by paragraph 18 as amended. See Instructions of May 23, 1913 (42 L. D. 170).

Paragraph 21 has been vacated and superseded and covered by circulars of May 4, 1912 and January 25, 1904. See Instructions of May 23, 1913 (42 L. D. 170).

**Valid prior adverse rights protected.**

22. An application for cash entry will be subject to any valid adverse right which may have attached to the same land pursuant to section twenty-three hundred and forty-eight, Revised Statutes.

**Applications for surveys.**

23. Qualified persons or associations who are lawfully in possession of tracts of coal lands which are still unsurveyed may, under sections twenty-four hundred and one, twenty-four hundred and two, and twenty-four hundred and three, Revised Statutes, as amended by the act of August twenty, eighteen hundred and ninety-four, apply to the surveyor-general for the survey of the township or townships, or portions thereof, embracing the lands claimed, to be specified as nearly as practicable. Each application must be accompanied by the affidavit of the applicant or applicants, duly corroborated by at least two competent persons, setting forth the qualifications of the former as claimant or claimants of the land, the facts constituting their possession, the character of the land, and such other facts in the case as are essential in that connection. If the surveyor-general approves the application he will thereupon transmit it to the general land office with the affidavits and his report.

**Rules of practice.**

24. The "rules of practice in cases before the United States district land offices, the general land office, and the department of the interior" will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

Paragraph 25 has been vacated and superseded by circular of May 4, 1912. See Instructions of May 23, 1913 (42 L. D. 170).

See, also, Instructions contained in Supplemental Circulars of April 24, 1907 (35 L. D. 681), May 20, 1907 (35 L. D. 683), May 23, 1913 (42 L. D. 170), and Oct. 30, 1913.

# CLASSIFICATION AND VALUATION OF PUBLIC COAL LANDS.

## REGULATIONS.

### I. Classification.

1. Land shall be classified as coal land if it contains coal having—

(a) A heat value of not less than eight thousand B. t. u. or an air-dried, unwashed or washed, unweathered mine sample.

(b) A thickness of or equivalent to fourteen inches for coals having a heat value of twelve thousand B. t. u. or more, increasing one inch for a decrease from twelve thousand to eleven thousand B. t. u., one inch for a decrease from eleven thousand to ten thousand five hundred B. t. u., one inch for each decrease of two hundred and fifty B. t. u. from ten thousand five hundred to ten thousand, and one inch for each decrease of one hundred B. t. u. below ten thousand.

(c) A depth below the surface for a bed of coal six feet or more thick of not more than one hundred feet for each three hundred B. t. u. or major fraction thereof, and for a bed of minimum thickness for that coal a depth of not more than five hundred feet, and for beds of any thickness between the minimum and six feet a depth directly proportional to that thickness within these limits, provided that, if the coal lies below the depth limit but within a horizontal distance from the surface not exceeding ten times the depth limit, or if its horizontal distance from the foot of a possible shaft (not deeper than the depth limit) plus seven and five-tenths times the depth of such shaft does not exceed ten times the depth limit, the land shall be classified as coal land; provided, further, that the depth limit shall be computed for each individual bed, except that where two or more beds occur in such relations that they may be mined from the same opening the depth limit may be determined on the group as a unit, being fixed at the center of weight of the group, no coal that is below the depth limit thus determined to be considered.

2. Classification shall be made by quarter-quarter sections or surveyed lots, except that for good reason classification may be made by two and one-half acre tracts or multiples thereof described as minor subdivisions of quarter-quarter sections or rectangular lotted tracts.

## II. Valuation.

3. For purposes of valuation the price per ton for a noncoking, nonanthracite coal six to ten feet thick shall be one-tenth of a cent for each twelve hundred and fifty B. t. u.:

(a) Provided that the price per ton may be increased by not more than one hundred per cent if the coal is coking, smokeless, or anthracite or has other enhancing qualities; or it may be decreased for high sulphur or ash, friability, or nonstoking or other qualities that reduce the value; and

(b) Provided, further, that if the coal in one bed is over ten feet thick the price on each foot above ten feet shall be reduced one per cent for each such foot (thus the reduction will be one per cent on the eleventh foot, two per cent on the twelfth foot, and so on); or if the coal is less than six feet thick the price shall be reduced by multiplying the normal value by $\frac{4+t}{10}$, where $t$ equals thickness in feet; and

(c) Provided that where the thickness of any bed varies irregularly its computed thickness (CT) over any area shall be equal to the average of the measurements (AM) less the sum of the differences between each measurement and the average of the measurements (SD) divided by the sum of the measurements (S):

$$CT = AM - \frac{SD}{S}$$

4. The value of any acre within fifteen miles of a railroad in operation shall be determined at the rate per ton prescribed above on an estimated recoverable tonnage of one thousand tons to the acre-foot: Provided that if the coal is in several beds having an aggregate thickness of more than ten feet if beds less than six feet thick are considered at the reduced

thickness as prescribed above, the value due to each foot above ten feet shall be reduced one per cent for each such foot (as in computing the price per ton on a single thick bed) up to a thickness of eighty feet, above which any additional thickness shall be valued at thirty per cent of the normal value.

5. This price shall be decreased one-half if the land is more than fifteen miles from a railroad in operation, or if it is within that limit but inaccessible owing to topographic conditions; but no land shall be valued at less than the legal minimum price, nor shall the price of any land exceed three hundred dollars an acre except in districts which contain large coal mines and where the character and extent of the coal are well known.

6. Within the above restrictions a graded allowance shall be made for increasing depth, and allowance may be made for any special conditions enhancing or diminishing the value of the land for coal mining.

7. If only a part of a smallest legal subdivision is underlain by coal the price per acre shall be fixed by dividing the total estimated coal values by the number of acres in the subdivision, but this price shall not be less than the minimum provided by law.

8. When lands which were at the time of classification more than fifteen miles from a railroad are brought within the fifteen mile limit by the beginning of operation of a new road, all values given in the original classification shall be doubled by the register and receiver.

9. Review of classification or valuation may be had only on application therefor to the secretary, accompanied by a clear and specific statement of conditions not existing or not known to exist at the time of examination. (Approved February 20, 1913.)

Previous regulations on classification and valuation were issued April 10, 1909 (37 L. D. 653), May 8, 1909 (37 L. D. 681), September 7, 1909 (38 L. D. 181), February 10, 1910 (38 L. D. 452), and November 15, 1912 (41 L. D. 396–399).

On the subject of classification of coal lands, see, also, Bulletin 537 of the United States Geological Survey, pp. 36, 37 and 65–111.

## AGRICULTURAL ENTRIES OF COAL LANDS—SEVERANCE AND RESERVATION OF TITLE TO THE UNDERLYING COAL FROM TITLE TO THE SURFACE.

This subject has been fully discussed in § 495a, *ante.*

[35 Stats. at Large, 844.]

*An act for the protection of the surface rights of entrymen.*

Any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: Provided, that the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: Provided further, that nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal. (Approved March 3, 1909.)

**Homestead, desert and Carey act entries on coal lands—Coal reserved and disposed of under coal laws.**

[36 Stats. at Large, 583.]

From and after the passage of this act unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey act, and to withdrawal under the act approved June seventeenth, nineteen hundred and two, known as the reclamation act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled, "An act to provide for an enlarged homestead": Provided, that those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

§ 2. That any person desiring to make entry under the homestead laws or the desert-land law, any state desiring to make selection under section four of the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey act, and the secretary of the interior in withdrawing under the reclamation act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said acts, shall state in the application for entry, selection, or notice of with-

drawal that the same is made in accordance with and subject to the provisions and reservations of this act.

§ 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this act, for the purpose of prospecting for coal thereon upon the approval by the secretary of the interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: Provided, that the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: Provided further, that nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation. (Approved June 22, 1910.)

**Surface rights in coal lands subject to state selections and isolated tract sales—Act of June 22, 1910, amended.**

[37 Stats. at Large, 105.]

From and after the passage of this act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands or are valuable for coal, shall, in addition to the classes of entries or filings described in the act of congress approved June twenty-second, nineteen hundred and ten, entitled "An act to provide for agricultural entries on coal lands," be subject to selection by the several states within whose limits the lands are situate, under grants made by congress, and to disposition, in the discretion of the secretary of the interior, under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so selected or sold and of the right to prospect for, mine, and remove the same in accordance with the provisions of said act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said act. (Approved, April 30, 1912.)

See circular of June 14, 1912 (41 L. D. 89); and similar circular relating to oil and phosphate lands in Idaho (42 L. D. 18, 19).

See Circular of Instructions of September 7, 1909 (38 L. D. 183), amending circular of March 25, 1909 (37 L. D. 528), relative to surface rights of entrymen under agricultural laws where the lands entered have been classified as coal lands. Also, see, Instructions of September 8, 1910 (39 L. D. 179), and March 6, 1911 (39 L. D. 544). See, also, Instructions as to agricultural entries of oil and gas lands in Utah, October 17, 1912 (41 L. D. 583).

## IX. INSTRUCTIONS RELATING TO SELECTION OF LANDS BY RAILROADS AND STATES.

### A. RAILROADS.

*Secretary Smith to the commissioner of the general land office, July 9, 1894.* (19 L. D. 21.)

**Rules for determining character of land.**

In the matter of the selection by railroad companies, of lands in satisfaction of their grants, the following rules and

regulations will be observed in determining whether the lands selected are mineral or nonmineral lands:

**Hearing to determine character of land.**

1. Where the lands have been returned by the surveyor-general as mineral, a hearing may be had to determine the character of the land, under rules 110 and 111 of rules and regulations issued December 10, 1891, controlling the disposal of mining claims.

See paragraphs 44 and 99–111 under present regulations, *ante*, Appendix.

The test as to mineral character in the case of railroad grants has been discussed in §§ 158, 159 of the text.

**Affidavit of company's land agent that lands are nonmineral.**

2. Where the lands selected by the company are within a mineral belt, or proximate to any mining claim, the railroad company will be required to file with the local land officers an affidavit by the land agent of the company, which affidavit shall be attached to said list when returned, setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employees of the company, as to their mineral or agricultural character, and that, to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

**Publication of statement of application for patent of lands, within six miles of mining claim.**

Upon receipt of said list you will cause it to be examined, and a clear list to be prepared of all lands embraced therein that are not within a radius of six miles from any mineral entry, claim, or location, which list shall be transmitted to the department for its approval. If any of the lands embraced in said list of selections are found upon examination to be within a radius of six miles from any mineral entry, claim, or location, you will cause a supplemental list of such lands to be prepared, and return the same to the register and receiver of the district in which they are situated, and notify the railroad company that they have been so returned. The register

and receiver will at once cause notice to be published in such newspapers as shall be designated by the commissioner of the general land office, containing a statement that the railroad company has applied for a patent for the lands, designating the same by townships, and has filed lists of the same in the local land office; that said lists are open to the public for inspection; that a copy of the same, by descriptive subdivisions, has been conspicuously posted in said land office for inspection by persons interested, and the public generally; and that the local land officers will receive protests, or contests, within the next sixty days, for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.

**Certification of lands whose character not contested.**

At the expiration of said sixty days, the register and receiver will return to the commissioner of the general land office said supplemental list, noting thereon any protests, or contests, or suggestions, as to the mineral character of any of such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list. After the same shall have been returned by the register and receiver, you will first eliminate from said supplemental list all the lands that have been protested or contested, or claimed to be more valuable for mineral than for agricultural purposes, or concerning which any suggestion has been made as to their mineral character. The remaining lands you will certify to this department for approval and patenting as agricultural.

**Hearings on land whose character contested.**

In regard to lands protested or contested, or claimed to be mineral, or concerning which any suggestion has been made, or report by the register and receiver, as to their mineral character, you will order a hearing to be had by the local land offices in each case, after giving due notice to the persons furnishing such information, and to the railroad company, under the existing rules and regulations of the department concern-

ing hearings in cases where the land has been returned as mineral land.

The railroad company shall pay to the register and receiver the cost of advertising said lands in the manner set forth.

**Regulations do not apply to lands already adjudged nonmineral.**

You are further instructed that all lists which have been heretofore prepared in accordance with any rules, regulations, or instructions of the secretary of the interior, where such rules have been complied with (such as furnishing affidavits showing the nonmineral character of the land in accordance with the instructions of the interior department), and such mineral affidavits furnished for each and every local subdivision,[1] shall be excepted from the terms of the foregoing regulations. Also, where lists of selections are now pending of lands returned by the surveyor-general as mineral, where hearings have been had in accordance with rules 110 and 111 of rules and regulations of December 10, 1891, above referred to, and the local officers have determined that said lands are nonmineral in character, and such determination has been approved by the general land office, such lands shall be submitted to the department for approval, without further investigation, although they may be within six miles of any mineral claim or location, unless since said hearing mineral claims or locations have been made of any tract embraced in said lists, in which event you will eliminate said tract from said list, and hold the same for further investigation.

[1] Amendment of April 9, 1897 (24 L. D. 321).

For various regulations and circulars applicable to specific railroad grants reference is made to the land decisions.

B. REGULATIONS WITH REFERENCE TO SELECTIONS OF LANDS BY STATES.
(39 L. D. 39.)

1. All lands selected must be from the unappropriated nonmineral surveyed public land, within the state, or territory, making the selection, and their nonmineral character must be

shown by the affidavit of some responsible party, having and testifying to a personal knowledge of the land, and shall apply to each smallest legal subdivision of land selected.

2. The selections in any one list, under special grants, or grants in quantity, should not exceed six thousand four hundred acres, and the selections in any one list of indemnity school lands must not in the aggregate exceed six hundred and forty acres.

3. All lists of indemnity school lands must be prepared so that each selected tract will correspond in area with the base tract, and separate base or bases must be assigned to each smallest legal subdivision of land selected.

4. The assignment of a portion of the smallest legal subdivision of a school section as the basis, in whole or in part, for indemnity selections, is permitted; but such assignment is an election by the state or territory to take indemnity for the entire subdivision, and is a waiver of its right to such subdivision, and any remaining balance must be used for future selections.

5. The cause of the loss for which indemnity is selected must be specifically stated, whether by entry, reservation, the mineral character of the land, or the fractional condition of the township.

6. The selecting agent must file with each list of selections of indemnity school lands a certificate, showing that indemnity has not previously been granted for the assigned base lands, and that no previous selection is pending for such assigned base; and with each list of selections of lands under quantity or special grants, a certificate that the selections and those pending, together with those approved, do not exceed the total amount granted for the purpose stated.

7. Whether indemnity is sought for school lands in place, because of their inclusion within any Indian, military, or other reservation, the list of selections must, in every case, be accompanied by a certificate of the officer, or officers, charged with the care and disposal of school lands, that the state has not previously sold, or disposed of, or contracted to sell, or

dispose of, any of said lands used as bases, or any part thereof; that the said lands are not in the possession of, or subject to the claim of any third party, under any law or permission of the state, or territory; and, within three months after the filing of any such list of selections, the state, or territory, must, in addition, file a certificate, from the recorder of deeds, or official custodian of the records of transfers of real estate, in the proper county, or from a reliable and responsible abstracter, or abstract company; that no instrument purporting to convey, or in any way encumber, the title to any of said lands used as bases, is of record, or on file, in the office of such custodian, and upon the report of the local officers of the failure of the state to file such certificate within the required time, any selection upon such base lands may be canceled without previous notice. No certificate from an abstracter, or abstract company, will be accepted until approval by the commissioner of the general land office of a favorable report of the chief of field division, or United States district attorney whose division or district embraces the lands in question, as to the reliability and responsibility of such abstracter or company.

8. The legal fees required by law must accompany all lists of selections.

No more than one number must be given to any list of selections, notwithstanding it may contain more than one selection.

9. Notice of selection of all lands must be given by publication once a week for five successive weeks in a newspaper of general circulation in the county where the lands are located, the paper to be designated by the register.

10. Notices for publication will be prepared by the register at the time of the acceptance of the selections, and will be transmitted by registered mail to the proper state or territorial official for publication in the paper or papers designated, and a copy of such notice shall also be posted by the register in a conspicuous place in his office and remain so

posted until the expiration of time allowed for the submission of proof of publication.

To save expense, the register may embrace two or more lists in one publication when it can be done consistently with the requirement of publication in a newspaper of general circulation in the county where the land is situated.

The published notice will embrace only the selected lands described by the largest legal subdivisions embraced in the separate lists, care being taken to avoid repetition of numbers of sections, townships, and ranges.

11. Proof of publication will be the affidavit of the publisher or foreman of the newspaper employed that the notice (a copy of which must be annexed to the affidavit) was published in said newspaper once a week for five successive weeks. Such affidavit must show that the notice was published in the regular and entire issue of the paper and was published in the newspaper proper and not in a supplement.

The proof of publication of notice must be filed with the register within ninety days after receipt of notice for publication and will be forwarded by the register to the general land office with a report as to whether protest or contest has been filed against any selection, and if protest or contest is filed the same shall accompany the report. Failure by the state or territory to furnish proof of publication within the time limited will be cause for the rejection of the selection, upon report of such failure by the register, accompanied with evidence of service of notice prescribed in rule 10.

During the period of publication, or any time thereafter, and before final approval and certification, the local officers may receive protest or contest as to any of the tracts applied for and transmit the same to the general land office.

Where lands sought to be selected are alleged, by way of protest, to be mineral, or where applications for patent therefor are presented under the mining laws, or are otherwise adversely claimed, proceedings in such cases will be in the nature of a contest and will be governed by the rules of practice in force in contest cases.

12. Surveyed lands of the United States, reserved or withdrawn from entry, location, and selection under the general land laws, and thereafter restored to the public domain (not under a special statute), may be selected in satisfaction of grants or reservations in aid of common schools, if of the character contemplated thereby, in such manner as shall be prescribed in the proclamations or notices of restoration. Lists of selections received by mail not more than three days prior to the day on which the lands are opened to entry, location, and selection generally will be treated as if received on the day of such opening, and will be considered as preferred after the claims of all persons present at the time of the opening of the office have been received, but a list received by mail more than three days prior to the day of the opening will be rejected as prematurely filed.

13. No application will be allowed for lands covered by an existing selection or entry, nor will any right be recognized as initiated by the tender of any such application. In any case, however, where for good and sufficient reason a selection has been held for cancellation, the state or territory may be permitted to relinquish such selection, and with such relinquishment tender a new application for the same land. This relinquishment and application must be accompanied by a statement, under oath, of the officer or officers of the state or territory charged with the selection of lands, showing that proper precaution was taken, in the first instance, to avoid the tender of a defective selection, and will be forwarded to the general land office, where the case will be considered and if the showing made is found satisfactory the relinquishment will be accepted and the new application returned for allowance as of the date of filing. The statement accompanying such relinquishment and application will be closely scrutinized and unless the utmost good faith is shown the new application will be rejected.

Amendment of indemnity school land selections by the substitution of new and valid base, in whole or in part, in place of that originally tendered, defective from any cause, may be

allowed, in the discretion of the commissioner of the general land office. Applications in such cases must be accompanied by a statement, under oath, of the officer or officers indicated in the paragraph next above, fully explaining the tender of the original defective base and how the error or mistake occurred, and will be forwarded to the general land office for consideration, where, if it is believed that every reasonable effort was made and precaution taken to avoid the tender of such defective base, the substitution of the new and valid base may be permitted in cases where no intervening claims exist.

14. The local officers will not enter on their records the relinquishment of any state selection until directed to do so by the general land office. All relinquishments of state selections will be forwarded to the general land office, through the local office, and, if accepted, the local officers will be directed to cancel the selections on their records. The cancellation will become effective as of the date of receipt of order of cancellation by the local office; after which, and not before, the land, if not reserved, will be subject to disposition under the general land laws.

15. When a school section has been identified by survey, and no claim is asserted thereto under the mining or other public land laws, the presumption is that title to the land has passed to the state, but such presumption may be overcome by the submission of satisfactory proof to the contrary.

16. The states will not be permitted to make selections in lieu of lands within a school section alleged to be mineral, in the absence of proof that such lands are known to be valuable for mineral. Such preliminary proof must show the kind of mineral discovered and the extent thereof.

17. Upon the submission by the state of an *ex parte* showing, consisting of corroborated affidavits, alleging that the land is valuable for mineral, accompanied with an application for indemnity in lieu of such lands, and certificates of the proper state authorities showing that said lands have not been sold, encumbered, or otherwise disposed of, as required by rule 7, the register will certify as to the date of the filing of said

list, the *status* of the land selected, as shown by the record, and forward the list to the general land office by special letter, without further action.

The legal fees payable upon such selection must be tendered with the application to select, and will be received and held as unearned fees and other trust funds until the selection has been allowed, or finally rejected, and in the meantime no action will be taken looking to the disposal of the selected land.

If the showing is deemed sufficient, a hearing will be ordered by this office to determine the character of the land, evidence to be submitted in support of the allegation contained in the preliminary showing. Notice of such hearing must be given by the state, by publication, once a week for five successive weeks, in a newspaper designated by the register of the land office of the district in which the lands are situated, as published nearest to the location of such base lands, and proof that the notice was published must be filed in the local land office on or before the day of hearing.

All proof filed and testimony taken at such hearing will be forwarded to the general land office.

Should the proof be found sufficient, the list will be returned for allowance, when notice of selection will be published, as required by rule 9 hereof, and the state will be further required to furnish the certificate of the officer in charge of the record in the county where the lands are situated, or from a reliable and responsible abstracter or abstract company, showing that said lands have not been sold, encumbered, or otherwise disposed of, as required by rule 7.

18. A determination by the general land office, or the department, that a portion of the smallest legal subdivision in a school section is mineral land will place that entire subdivision in the class of lands that may be used as a basis for indemnity selection, and where mineral entry was made of any portion of the smallest legal subdivision of a school section that fact will be taken as determining the right of the state to indemnity for the entire legal subdivision upon proper showing that the state has not made any disposition of the land not embraced in such mineral entry.

19. All previous rulings and instructions not in harmony herewith are hereby vacated. (Approved June 23, 1910.)

The act of April 30, 1912 (37 Stats. at Large, 105), provides that the states may make selection of coal lands but shall acquire title to the surface only, the coal itself being reserved from the grant. See Appendix, *ante*, under subhead "Agricultural Entries of Coal Lands." The act of February 27, 1913, permits the same procedure for selection by the state of Idaho of oil and phosphate lands (42 L. D. 18, 19). As to the selection by states of lands in lieu of unsurveyed sixteenth and thirty-sixth sections in forest reserves, see State of Montana, 38 L. D. 247.

## X. PETROLEUM LAW OF FEBRUARY 11, 1897, AND CIRCULAR INSTRUCTIONS RELATING THERETO.

**Petroleum.**

Department of the Interior,
General Land Office,
Washington, D. C., February 25, 1897.

Registers and Receivers, U. S. Land Offices.

Sirs: Your attention is directed to the act of congress, approved on February 11, 1897, as follows:

[Public No. 57.]

An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor under the provisions of the laws relating to placer mineral claims; provided, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

**Act applies only to lands as to which no valid adverse claim existed prior to February 11, 1897.**

It is to be observed that though the provisions of the placer mineral land laws are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, yet the substances named are not expressly stated to be mineral, in view of which it would appear that the prior assertion of a legal adverse claim to land valuable for petroleum or other mineral oils would preclude the acquisition of any rights thereto under the provisions of the mineral land laws.

Claims to lands of the character mentioned, heretofore initiated under the mineral land laws are by said act expressly confirmed; but this confirmation must, of course, be construed as applying only to cases where, prior to February 11, 1897, no valid adverse claim to lands involved had been acquired under other than the mineral land laws.

In proceeding under this law, you will act in accordance with the views herein set forth.

Very respectfully,
S. W. LAMOREUX,
Commissioner.

Approved:
DAVID B. FRANCIS,
Secretary.

For the provisions of the "Withdrawal Acts" affecting oil lands, see this Appendix, *ante*, subdivision V. See § 422 of the text, *ante*. The act of February 27, 1913, and Instructions of March 22, 1913 (42 L. D. 18, 19), provide for the acquisition of title by the state of Idaho to the surface of oil and phosphate lands, these minerals being reserved in favor of claimants under the Mining Acts.

## XI. ALIEN ACT OF MARCH 2, 1897.

*An act to better define and regulate the right of aliens to hold and own real estate in the territories.*

As to the effect of this act, see Opinion of Attorney-General, 28 L. D. 178.

See, also, discussion in text, § 243.

**Aliens not to hold lands in territories—Exceptions.**

An act entitled "An act to restrict the ownership of real estate in the territories to American citizens, and so forth," approved March 3, 1887, except so far as it affects real estate in the District of Columbia, be, and the same is hereby, amended so as to read as follows:

"§ 1. That no alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States in the manner provided by law, shall acquire title to or own any land in any of the territories of the United States except as hereinafter provided; provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer."

Rights of aliens in territories prior to this act: §§ 242–244.
Power of congress over territories: § 242.
General scope of former act: § 244.
For discussion of this act, see § 684, and note.

**Resident aliens may hold lands—Aliens not prohibited by this act from acquiring and holding mines.**

"§ 2. That this act shall not apply to land now owned in any of the territories of the United States by aliens, which was acquired on or before March 3, 1887, so long as it is held by the then owners, their heirs or legal representatives, nor to any alien who shall become a *bona fide* resident of the United States, and any alien who shall become a *bona fide* resident of the United States, or shall have declared his intention to be-

come a citizen of the United States in the manner provided by law, shall have the right to acquire and hold lands in either of the territories of the United States upon the same terms as citizens of the United States; provided, that if any such resident alien shall cease to be a *bona fide* resident of the United States then such alien shall have ten years from the time he ceases to be such *bona fide* resident in which to alienate such lands. This act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town, or village, or in any mine or mining claim, in any of the territories of the United States."

This clause does not confer upon aliens greater rights as to mines or mining claims in the territories than they are given under the general mining laws. Opinion of Attorney-General, 28 L. D. 178.

**Aliens may acquire lands by descent and mortgage, but must dispose of them.**

"§ 3. That this act shall not prevent aliens from acquiring lands or any interests therein by inheritance or in the ordinary course of justice in the collection of debts, nor from acquiring liens on real estate or any interest therein, nor from lending money and securing the same upon real estate or any interest therein; nor from enforcing any such lien, nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured; provided, however, that all lands so acquired shall be sold within ten years after the title shall be perfected in him under said sale or the same shall escheat to the United States and be forfeited as hereinafter provided."

**Conveyances in evasion of this act are void.**

"§ 4. That any alien who shall hereafter hold lands in any of the territories of the United States in contravention of the provisions of this act may nevertheless convey his title thereto at any time before the institution of escheat proceedings as

hereinafter provided; provided, however, that if any such conveyance shall be made by such alien, either to an alien or to a citizen of the United States, in trust and for the purpose and with the intention of evading the provisions of this act, such conveyance shall be null and void, and any such lands so conveyed shall be forfeited and escheat to the United States."

**Escheat proceedings—Notice.**

"§ 5. That it shall be the duty of the attorney-general of the United States, when he shall be informed or have reason to believe that lands in any of the territories of the United States are being held contrary to the provisions of this act, to institute or cause to be instituted suit in behalf of the United States in the district court of the territory in the district where such land or a part thereof may be situated, praying for the escheat of the same on behalf of the United States to the United States; provided, that before any such suit is instituted the attorney-general shall give or cause to be given ninety days' notice by registered letter of his intention to sue, or by personal notice directed to or delivered to the owner of said land, or the person who last rendered the same for taxation, or his agent, and to all other persons having an interest in such lands of which he may have actual or constructive notice. In the event personal notice cannot be obtained in some one of the modes above provided, then said notice shall be given by publication in some newspaper published in the county where the land is situated, and if no newspaper is published in said county then the said notice shall be published in some newspaper nearest said county."

**Sale of land—Disposal of proceeds—Alien becoming qualified.**

"§ 6. That if it shall be determined upon the trial of any such escheat proceedings that the lands are held contrary to the provisions of this act, the court trying said case shall render judgment condemning such lands and shall order the same to be sold as under execution; and the proceeds of such

sale, after deducting cost of such suit, shall be paid to the clerk of such court so rendering judgment, and said fund shall remain in the hands of such clerk for one year from the date of such payment, subject to the order of the alien owner of such lands, or his heirs or legal representatives; and if not claimed within the period of one year, such clerk shall pay the same into the treasury of the territory in which the lands may be situated, for the benefit of the available school fund of said territory; provided, that the defendant in any such escheat proceedings may, at any time before final judgment, suggest and show to the court that he has conformed with the law, either becoming a *bona fide* resident of the United States, or by declaring his intention of becoming a citizen of the United States, or by the doing or happening of any other act which, under the provisions of this act, would entitle him to hold or own real estate, which being admitted or proved, such suit shall be dismissed on payment of costs and a reasonable attorney fee to be fixed by the court."

**General application of the act.**

"§ 7. That this act shall not in any manner be construed to refer to the District of Columbia, nor to authorize aliens to acquire title from the United States to any public lands in the United States or to in any manner affect or change the laws regulating the disposal of the public lands of the United States. And the act of which this act is an amendment shall remain in force and unchanged by this act so far as it refers to or affects real estate in the District of Columbia.

"§ 8. That all laws and parts of laws so far as they conflict with the provisions of this act are hereby repealed."

## XII. RECENT LEGISLATION AND REGULATIONS ON SUBJECT OF MINING CLAIMS WITHIN FOREST RESERVATIONS.

Congress on March 3, 1891,[1] passed an act authorizing the president to create forest reservations by proclamation. Supplementing this act congress on June 4, 1897,[2] passed an act

making appropriations for sundry civil expenses of the government, and embodied therein certain regulations relating to forest reservations among which were the following:—

[1] 26 Stat. 1095.

[2] 30 Stats. at Large, 11, 35, 36. For full discussion of the nature and effect of this legislation, see §§ 197–199 of the text.

**Mineral lands not intended to be included.**

"It is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." . . . .

**Use of timber and stone by settlers, miners, etc.**

"The secretary of the interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing buildings, mining, prospecting and other domestic purposes, as may be needed by such persons for such purposes." . . . . .

**Entry for purpose of prospecting, locating and developing mines not prohibited.**

"Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof; provided, that such persons comply with the rules and regulations covering such forest reservations." . . . .

**Use of waters on such reservations.**

"All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the state wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

**Restoration of mineral and agricultural lands to public domain.**

"Upon the recommendation of the secretary of the interior with the approval of the president, after sixty days' notice thereof published in two papers of general circulation in the state or territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation, which after due examination by personal inspection of a competent person appointed for that purpose by the secretary of the interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained."

ACT OF FEBRUARY 1, 1905 [33 STAT. 628].

"The secretary of the department of agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying or patenting of any of such lands." . . . .

"§ 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals within and across the forest reserves of the United States are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during

the period of their beneficial use, under such rules and regulations as may be prescribed by the secretary of the interior, and subject to the laws of the state or territory in which said reserves are respectively situated."[3]

[3] The department of agriculture and the department of the interior have concurred in the opinion that the above law divides the jurisdiction over forest reserves as follows: All grants of rights or privileges within forest reserves, which do not affect the title to the land or cloud the fee, are under the jurisdiction of the secretary of agriculture. All grants which dispose of title to or give an easement running with the land are under the jurisdiction of the secretary of the interior.

## REGULATIONS AND INSTRUCTIONS TO FOREST OFFICERS.

The department of agriculture from time to time issues various pamphlets containing regulations and instructions to forest officers on special uses, timber sales, claims, trespass, water-power, grazing, forest plans, etc. The following excerpts have been taken from these:

"By virtue of the authority vested in the secretary of agriculture by the act of congress of February 1, 1905 (33 Stat. 628), amendatory to the act of congress of June 4, 1897 (30 Stat. 11), the following regulations relating to claims on national forest lands, the same to supersede all previous regulations for like purpose and to be in force and effect from the first day of February, 1912, and to constitute a part of the Use Book, have been made."[4]

[4] Prior to the passage of the act of February 1, 1905, the secretary of the interior issued rules and regulations governing forest reserves (25 L. D. 589), certain of which were held to be reasonable and entitled to respect and obedience. Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301.

"It is the purpose and intent, however, to protect the lands of the United States within the national forests from acquisition by those who do not seek them for purposes recognized by law, and when it is apparent that an entry or a claim is not initiated in good faith and in compliance with the spirit of the law under which it is asserted, but is believed from the facts to be a subterfuge to acquire title to timber land, or to control range privileges, water, a water-power site, or rights

of way; or if it otherwise actively and materially interferes with the essential interests of the national forest in that locality and is not made or maintained in good faith, a contest should be recommended, even if the technical requirements of the law appear to have been fulfilled. As to mining claims, it should especially be borne in mind that good faith almost necessarily exists when the claims are located on untimbered and unwatered lands which control no means of access or rights of way and are valueless for any occupancy purposes.

"No claims can be initiated upon lands within national forests, nor upon lands withdrawn for national forest purposes, except under the mining laws, the coal land laws, and under the act of June 11, 1906 (34 Stat. 233)." . . . .

"The determination of questions involving title to unperfected claims in national forests is within the jurisdiction of the secretary of the interior.[5]

[5] The secretary has held, however, in a recent decision (October 24, 1913), as yet unpublished, that the land department has no jurisdiction in advance of an application for a mineral patent to investigate and determine that a mining location is invalid. To this extent, at least, the Yard case has been overruled. See discussion of the Yard case and note in § 664 of the text.

"A valid claim is one initiated in good faith under some act of congress for the acquisition of title to public lands and continued by use consistent with the character of the claim and necessary for its actual development.

"It is a fundamental requisite that all claims be initiated in good faith for the purpose contemplated by the law under which they are held. It is bad faith, for instance, to hold a mining or agricultural claim primarily for the timber thereon or to acquire a site valuable for water-power development. Where the land is held for the timber, for a hotel site, saloon site, or other foreign use, and there has been no compliance with the requirements of the law under which the claim was initiated, it may be considered prejudicial to national forest interests.

"It has been held by the department of the interior that the withdrawal of lands for and their inclusion in a national forest constitutes the government an adverse claimant to the land. No contest or protest against issuance of patent can be considered by the general land office unless specific charges are filed within two years after the date of issuance of final certificate, except as to timber and stone entries.

"In harmony with the practice of the general land office, all reports on claims made by forest officers must be held as confidential, and may be examined only by duly authorized officers and employees of the government.

"Prospecting will not be interfered with and mineral locations will not be examined prior to application for mineral patent, except where a report is requested by the department of the interior or where locations interfere with the administration of the national forest. No adverse report will be submitted to the department of the interior which has not been made by a mineral examiner." . . . .

"The locator, or subsequent owner, of a mining claim has a right to the use of sufficient timber from his claim for development purposes. This includes the construction of such buildings as may be necessary as an adjunct to such development and the timber for shafts and tunnels, as well as for fuel in connection with such development. Timber, however, may not be cut from one claim to be used on another claim even if it be of the same group unless its use tends to develop the claim from which it is cut, as well as the one on which it is used, except under free-use permit (Regs. S–19 to S–27).

"A mining claimant has no right whatever to cut or remove timber from his claim for sale or for purposes other than the development of the claim, and such removal constitutes trespass (Reg. T–2), except where the removal of the timber reasonably in advance of the mining work is necessary to the development of the claim." . . . .

"Examinations and reports upon claims will be made by forest officers under instructions from the forest supervisors:

"(a) Upon request from the commissioner of the general land office or the chief of field division;

"(b) Upon receipt from the local land office of notice of application for patent on a mining claim, or of notice of intention to submit final proof on an agricultural claim;

"(c) When claimants are making unlawful use of claims, or are holding them for unlawful purposes, or bad faith in connection with them is manifest, or when a trespass occurs upon or under color of a claim." . . . .

"A preliminary report on a mining claim will be considered favorable when it shows (a) that the claim is apparently held in good faith for the purposes authorized by law; (b) that the expenditure has been made on the improvement work as required by law; and (c) that the issuance of patent will not prejudice the interests of the United States." . . . .

"No recommendation for or against patenting will be made in a preliminary report upon a mineral claim. In the case of an unfavorable report by a mineral examiner the recommendation should be made by such officer that the location or entry 'be declared invalid' or 'canceled,' and the report should specify the charges or reasons for making the adverse recommendations. Where the report is favorable, the recommendation should be that 'patent issue.'" . . . .

"In accordance with the instructions of the secretary of the interior, registers and receivers will send to supervisors concerned copies in triplicate of notices of final proof and of applications for mineral entry. A copy of the notice in each case must be returned to the register and receiver prior to the date advertised for submission of final proof. It is desired that reports be obtained by the supervisor prior to the return of the notice, and notices will be held whenever possible until reports have been received. When it is evident to the supervisor that because of climatic conditions an early examination and report cannot be made, he will return the notice to the register and receiver with an indorsement giving the date approximately when the report will be sent to the district forester." . . . .

"Notice of an order for survey of a mineral claim is not a request from the interior department for a report, and no report on the claim will be made at the time of this survey unless the claim actually interferes with the administration of the national forest. Upon receipt of notice of an order for mineral survey, which notice will contain the name and address of the mineral surveyor and of the claimant and the name, survey number, and approximate location of the claim, the supervisor will when necessary instruct a forest officer to be present when the survey is made. The forest officer will make and submit a memorandum, to be filed for future reference, of the boundaries, the expenditure, and the development work, to which the surveyor will certify, and of the cuts, shafts, and tunnels on the claim.

"When a mineral claim is to be examined, the supervisor will send the forest officer who is to make the examination a copy of the memorandum, or may when necessary secure from the local land office a copy of that part of the mineral surveyor's field-notes relating to development work and improvements. If they are not available, the district forester may secure a copy from the surveyor general's office.

"When the district forester has determined from the facts presented in the preliminary report on a mineral claim that the conclusions (a) and (b) are not warranted, and an examination by a mineral examiner has been ordered, the claimant will be notified by the supervisor of the date the examination will be made and will be requested to be present or be represented. The report of the mineral examiner will be submitted to the forest supervisor and will be acted upon in accordance with the procedure followed in all other claims reports." . . . .

"If upon a review of the report the district forester is of the opinion that no contest should be initiated, he will transmit the report direct to the proper chief of field division of the general land office with an indorsement of 'No protest,' except that in the case of claims under the mining laws which have not been examined for mineral discovery the notice of

'No protest' will be by letter from the district forester to the chief of field division instead of by the transmittal of an indorsed report. In such cases the letter will be in the following form:

"Chief of Field Division,
General Land Office, Portland, Oreg.

"Dear Sir: The Forest Service will enter no protest against the issuance of patent for Mineral Survey No. 2444, Mineral Application No. 02588, Coeur d'Alene Land District, Wampum Mining Co., claimant for the Wigwam Lode, within the Coeur d'Alene National Forest.

"Reference is made to letters ('N. H. C. F.') of the Commissioner of the General Land Office to the Forester, dated May 7 and September 20, 1910, respectively, requesting report on this case.

"Very truly yours,

——— ———,

"District Forester.

"If the chief of field division is of opinion that no hearing is necessary, he will, in accordance with the regulations of the interior department, transmit the report or the letter 'No protest' to the commissioner of the general land office with his recommendation.

"When upon a review of the facts presented in a preliminary report on a mineral claim it is determined that the conclusions do not warrant a favorable report, the district forester will order an examination and report by a mineral examiner. No other action will be taken upon the preliminary report, and the report of the mineral examiner, when received, will be acted upon in accordance with the procedure followed in other reports from forest officers."[6] . . . .

[6] The foregoing provisions are extracts from the National Forest Manual on "Claims."

"The secretary of agriculture does not undertake to ascertain whether lands are mineral in character which are described and listed by him as chiefly valuable for agriculture.

Any contests between mineral claimants and applicants for entry involving lands which have been listed under this act will be decided by the secretary of the interior."[7] . . . .

[7] National Forest Manual, "Settlement," under act of June 11, 1906 (34 Stat. 233), providing for homesteads within national forests.

"Supervisors will not select mineral lands for administrative sites unless a suitable site on nonmineral land cannot be secured."[8] . . . .

[8] National Forest Manual, "Administrative Sites."

"Persons holding unpatented mining claims within a national forest have the right to the grass or other forage upon such claim needed for stock used in connection with the development of the claim, but they have no right to dispose of the forage to any other person or to collect rental for the use of the claims for grazing purposes. Such unperfected mining claims therefore cannot be accepted as the basis for a permit under this regulation.

"Persons holding permits for range within which mining claims occur should be warned not to allow their stock to graze upon them without the consent of the claimant."[9]

[9] National Forest Manual, "Grazing," as to cutting.

"Timber included in a sale upon which mineral locations have been made after the execution of the timber-sale contract will be cut as government timber. If the location was made after the application was received and before the contract was executed, and was evidently made to interfere with the timber sale, cutting must be suspended, but a report on the claim will be forwarded immediately to the district forester, who will at once report the matter to the chief of field division, with a request for speedy action to determine the validity of the claim.

"It was decided by the United States circuit court for the district of South Dakota, in Lewis v. Garlock, (168 Fed. 153), that the United States may sell insect-infested timber from a mining claim that has not passed to patent when the timber

is a menace to that on adjoining national forest land. Accordingly forest officers may dispose of inseet-infested timber from unperfected mining claims when such timber is an actual menace to the forest." . . . .

"Where the boundaries of a mining location are not specifically marked and there are practically no evidences of its existence, a sale of the timber on the area may be consummated notwithstanding subsequent protest of any party alleging the location of a mineral claim covering such area prior to the sale.

"The department will not attempt, without the consent of the claimant, to sell or cut timber from unperfected subsisting claims within a national forest except in emergencies arising from insect infestations." [10]

[10] National Forest Manual, "Timber Sales."

For circulars relating to lieu selections provided for in the act creating forest reserves, see 28 L. D. 521; 29 L. D. 391; 31 L. D. 372; 33 L. D. 558; 35 L. D. 8; 40 L. D. 360, 549; 41 L. D. 278, 284; 38 L. D. 247, and § 199 of the text.

For provisions as to the free use of timber for mining purposes in forest reserves, see latter portion of the next subdivision.

## XIII. LEGISLATION CONCERNING THE CUTTING OF TIMBER ON PUBLIC MINERAL LANDS.

As to the privilege of cutting timber on the public lands for mining purposes, we note the following provisions:—

On June 3, 1878, a law was passed by congress wherein it was provided—

"That all citizens of the United States and other persons *bona fide* residents of the state of Colorado or Nevada or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby authorized and permitted to fell and remove for building, agricultural, mining, or other domestic purposes any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United

States, except for mineral entry in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes; provided, the provisions of this act shall not extend to railroad corporations."[1]

[1] 20 Stats. at Large, 88.

This act is cited and referred to as act of June 3, 1878 (No. 1).[2]

[2] See Instructions, 34 L. D. 167.

Unsurveyed land within the limits of a railroad grant, which, when surveyed, would be within an odd-numbered section, are not public lands within the meaning of this act. United States v. Mullan Fuel Co., 118 Fed. 663, 664.

A careful analysis and general review of the decisions under this act will be found in United States v. Edgar, 140 Fed. 655. Definitions of the word "timber" are found in Andrew v. Stuart, 31 L. D. 264, and Sontag v. Reid, 33 L. D. 34. Smelting is one of the uses contemplated by the act (In re White, 34 L. D. 78), and roasting of ore previous to smelting. United States v. United Verde M. Co., 196 U. S. 207. Municipal use of timber for electric light plants, building bridges and flumes, etc., are within the terms of the act. 34 L. D. 112. The privilege granted extends only to public mineral lands susceptible of mineral entry alone. Gallagher v. Gray, 35 L. D. 90. This latter view is approved in United States v. Plowman, 216 U. S. 372, 30 Sup. Ct. Rep. 299. As to control by the forest service of timber on mining claims in national forests, see Lewis v. Garlock, 168 Fed. 153. The cases of United States v. Basic Co., 121 Fed. 504, United States v. Rossi, 133 Fed. 380, and Morgan v. United States, 169 Fed. 242, held that timber could be removed from lands in the neighborhood of mining claims or discovered mineral deposits, but these cases were overruled by United States v. Plowman, 216 U. S. 372, 30 Sup. Ct. Rep. 299, which held that only lands known to be themselves valuable for minerals were contemplated by the act. The burden of proof rests on the party who defends under the act. United States v. D. & R. G., 191 U. S. 84. The right to cut granted by the act is exceptional, and quite narrow, and the burden of proof is on the party claiming the right. Northern Pacific R. R. Co. v. Lewis, 162 U. S. 366, 376. For a discussion of what are mineral lands within the meaning of this act, see United States v. Plowman, 216 U. S. 372.

See, also, on the general subject, United States v. Morgan, 148 Fed. 189, and United States v. Copper Queen C. M. Co. (Ariz.), 60 Pac. 885, 886.

On an issue as to whether land on which timber is cut is actually mineral land within the meaning of the act, it is not error to admit in evidence either a geological map issued by the department of the interior covering the land in question, or a certified copy of the "General description of the survey" of the land in question made by the surveyor-general of the state in which the land is situated. United States v. Van Winkle, 113 Fed. 903.

Circular instructions have been issued from time to time by the secretary of the interior referring to this act.[3]

[3] 1 L. D. 597, 602, 614, 618, 697; 2 L. D. 823; 5 L. D. 129; 24 L. D. 349, 571; 37 L. D. 494. The latest are found in 42 L. D. 30, 163, 310.

A person defending the cutting of timber on public land by virtue of the act of June 3, 1878, should plead facts showing a compliance with such rules and regulations prescribed on the subject by the secretary of the interior as the secretary has power to adopt. What authority the secretary possesses in this connection is uncertain; but the act should be liberally construed, and the secretary has no power to make rules and regulations which annul or limit its effect. United States v. Mullan Fuel Co., 118 Fed. 663, 665, 666; United States v, United Verde Copper Co., 196 U. S. 207.

As to the interpretation to be given to the rules prescribed by the secretary of the interior concerning the keeping of records of timber cut on mineral land, see United States v. Price Trading Co., 109 Fed. 239.

Where punitive damages are sought for cutting timber on public mineral land in violation of the rules and regulations of the secretary of the interior, it is proper to show the good faith of the defendant by evidence that he acted on advice of counsel as to what was a compliance with such rules and regulations. United States v. Mullan Fuel Co., 118 Fed. 663, 667. See, also, United States v. Van Winkle, 113 Fed. 903.

On the same day on which the act referred to above was passed congress enacted what was known as the "timber and stone act." This act, among other things, inhibited the cutting and wanton destruction of timber growing on any lands of the United States in California, Oregon, Nevada, and Washington Territory, and the removal with intent to export or dispose of the same; *provided*, that nothing in the act contained should be construed to prevent any miner or agricul-

turist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage.[4]

[4] 20 Stats. at Large, 89. See Circular Regulations of August 22, 1911 (40 L. D. 238). See, also, act of March 4, 1909 (35 Stats. at Large, 1088), and Regulations, 42 L. D. 30.

This act is referred to as the act of June 3, 1878 (No. 2), or as the "timber and stone act."[5]

[5] This act does not authorize the cutting of timber on an unpatented mining claim for the purpose of sale or removal. Such privilege is limited to the necessary use of the timber on the claim (Teller v. United States, 113 Fed. 273), nor for use at a quartz-mill (United States v. English, 107 Fed. 867; Id., on appeal, 116 Fed. 625; Circular Instructions, 24 L. D. 167). See, also, Lewis v. Garlock, 168 Fed. 153, as to the control of the forest service over timber on unpatented mining claims in national forests.

The first act was held to be confined in its operation to the states and territories named, and that the phrase, "all other mineral districts," was too indefinite to warrant the extension of the provisions of the act to other states and territories.[6]

[6] United States v. Smith, 11 Fed. 487; United States v. Benjamin, 21 Fed. 285; United States v. English, 107 Fed. 867; S. C., on appeal, 116 Fed. 625.

On August 4, 1892, the second act was amended by striking out the names of the states and territories therein appearing and inserting in lieu thereof the words "public land states," the avowed purpose of the amendatory act being to make the provisions of the first act applicable to all public land states.[7]

[7] 27 Stats. at Large, 348; Circular Instructions, 24 L. D. 167.

There is still another act which may be referred to as the third act, which was passed March 3, 1891,[8] and amended July 1, 1898.[9]

[8] 26 Stats. at Large, 1093, 1095.
[9] 30 Stats. at Large, 597, 618.

It was originally limited in its operation to the states of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the district of Alaska,[10] and the gold and sil-

ver regions of Nevada and Utah, and subsequently extended so as to embrace California, Oregon, and Washington.[11]

[10] The right to cut and use timber on the public lands in Alaska under the supervision of the secretary of the interior is now governed by the act of May 14, 1898 (30 Stats. at Large, 409).

[11] Act of March 3, 1901 (30 L. D. 542).

The object of this act was to enable the secretary of the interior to permit the cutting of timber for agricultural, mining, manufacturing, or domestic purposes from the unreserved nonmineral public lands of the United States, under such rules and regulations as he might prescribe, in order that settlers upon the public lands and other residents within the states and territories named in the act might procure timber from the public lands, under authority of law, to supply their immediate wants for the purposes above stated.[12]

[12] Circular Instructions, 31 L. D. 412. For circular instructions as to this part of the act, see 12 L. D. 456; 13 L. D. 149; 14 L. D. 96; 29 L. D. 399; L. D. 404 (Alaska); 29 Id. 572; 30 Id. 542.

With the exception of the states of Idaho, Wyoming, and Montana, timber so cut must be used in the state or territory where it is felled. These states enjoy certain reciprocal privileges, under the supervision of the secretary of the interior, authorizing the removal into one state of timber cut in the other.[13]

[13] 27 L. D. 276; 30 L. D. 540; 31 L. D. 412. On the subject of removal and exportation generally, see Circular Instructions, 24 L. D. 587.

There is a fourth act, passed June 4, 1897, which provides that—

"The secretary of the interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon forest reservations free of charge by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such

purposes; such timber to be used in the state or territory, respectively, where such reservation may be located."[14]

[14] 30 Stats. at Large, 11, 35. Circular Instructions, 24 L. D. 589, 593; opinion, 29 L. D. 383, now superseded by "Free Use" National Forest Manual issued by the department of agriculture.

The manner in which the privileges conferred by these various acts may be exercised, and the restrictions imposed by the regulations of the land department and forest service, may be ascertained by consulting the various rulings and circulars referred to in the notes. The subject does not deserve further prominence in this treatise.

# TITLE XIII.

# STATE AND TERRITORIAL LEGISLATION.

## TERRITORY OF ALASKA.

I. Federal Laws and Regulations Concerning Mines in Alaska.
   A. Statutes.
   B. Land Department Regulations.

II. Territorial Laws.
   A. Act of April 30, 1913, Relating to the Location and Development of Mining Claims in Alaska.
   B. Reference to Miscellaneous Territorial Legislation.

### I. FEDERAL LAWS AND REGULATIONS CONCERNING MINES IN ALASKA.

By an act of congress, approved August 24, 1912 (37 Stats. at Large, 512, Comp. Laws 1913, §§ 408–426), Alaska, which had prior to that date been governed as a civil and judicial district under direct legislation by congress, was regularly organized as a territory. No change was made in the executive or judicial departments, but provision was made for the election of a territorial legislature with full power to legislate for Alaska on all subjects except those expressly prohibited in the act. By the same act all laws of the United States "not locally inapplicable" were extended in their effect to the newly created territory. We have heretofore noted (*ante*, §§ 64 and 243) that the passage of the above act has placed Alaska in the category formerly occupied by the territories within the United States proper.

In addition to the general extension of the laws of the United States in their application to Alaska, there are still in effect a number of special statutes enacted prior to the adoption of the organic act above referred to. Such of these acts as are germane to the field covered by this work are here presented in full, followed by the regulations of the land department concerning them. To this compendium is added the mining legislation passed at the first session of the territorial legislature, held in 1913.

#### A. Federal Mining Statutes Relating to Alaska.

*Act of May 17, 1884, providing for the civil government of Alaska.*
[23 Stats. at Large, 24.]

**Alaska created land district—Land office at Sitka—Mining laws extended to Alaska—Prior possessions protected.**

§ 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located

at Sitka. [The commissioner provided for by this act to reside at Sitka shall be *ex-officio* register of said land office, and the clerk provided for by this act shall be *ex-officio* receiver of public moneys, and the marshal provided for by this act shall be *ex-officio* surveyor-general of said district], and the laws of the United States relating to mining claims and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district under the administration thereof herein provided for, subject to such regulations as may be made by the secretary of the interior, approved by the president; provided, that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by congress; and provided further, that parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid; and provided also, that the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States. 23 Stats. at Large, p. 24, sec. 8; Carter's Annot. Codes, pp. 442, 452; Comp. Laws 1913, p. 144, note.

It would seem that the last sentence of the foregoing section was nullified by the language of the new organic act extending all federal laws to Alaska which are not locally inapplicable.

The above act protects possessory claims to mines in Alaska theretofore initiated, though not based upon a compliance with all the provisions of the United States laws relative to the location of a mining claim. Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. Rep. 963, 39 L. ed. 1046.

Congress passed an act in 1897 (approved July 24th) amending section 8 above by striking out the words above included in brackets. The amendment also provides for the appointment of a register and receiver of the land office and a surveyor-general, and authorizes the president to create two additional land districts in the district of Alaska (30 Stats. at Large, p. 215). But no additional districts were created under this act. By section 12 of the act of May 14, 1898 (30 Stats. at Large, p. 414), it was provided:—

"That the President is authorized and empowered, in his discretion, by executive order, from time to time to establish or discontinue land districts in the district of Alaska, and to define, modify, and change the boundaries thereof, and designate or change the location of any land office therein."

After the discovery of gold in the Klondike and adjacent countries, mining enterprises in Alaska were so stimulated that it was thought advisable to create additional districts. Accordingly, by executive order, issued June 14, 1898, Alaska was divided into three land districts—the Sitka district, in the southern portion, with its land office at Sitka; the Circle district, in the northeastern portion, with its land office first at Circle City and later at Rampart; and the Yukon district, in the northwestern portion, with the office first at Nulato, next at Weare, then at Rampart, and finally at St. Michael. Later, by executive order of February 14, 1899, the Peavy land district was carved out of northern portions of the Yukon and Circle districts, with the land office at Peavy; but this district was abolished by executive order of February 24, 1900. Owing to lack of business in the Yukon and Circle districts, Commissioner Hermann, in his annual report for the year 1901, recommended that they be also discontinued. (See page 57.) Accordingly, by act of congress, approved February 14, 1902 (Stats. 1st Sess. 57th Congress, p. 20), it was provided:—

"That on and after June 1st, nineteen hundred and two, the number of land offices and land districts in the district of Alaska is hereby reduced to one, the location of which shall be fixed by the President."

Under this act the executive order of April 2, 1902, was issued, by which the land districts previously created in Alaska were discontinued and the Juneau land district established for the entire territory, with the land office at Juneau. This order went into effect on June 1, 1902. By act of March 2, 1907, 34 Stats. at Large, p. 1232, two additional land districts with land offices at Nome, Alaska, and Fairbanks, Alaska, were created.

For territorial legislation relating to location of mining claims, annual labor, etc., see act of territorial legisiature, April 30, 1913 (Sess. Laws of 1913, ch. 74, pp. 283–291), *post*, p. 2425.

*An act making further provision for a civil government for Alaska, and for other purposes.*

[Approved June 6, 1900 (31 Stats. at Large, p. 321).]

Prior to this date Alaska was governed by the laws of the state of Oregon of 1884.

The act contains the following provisions:—

**Recording notices of location of mining claims.**

Title I, ch. I, § 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the attorney-general, record separately, in large and well-bound separate books, in fair hand [among other instruments]:—

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others; provided, notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject matter affected by the instrument is situated, and where the property or subject

matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject matter is situated. Alaska Codes, p. 7; Carter's Annot. Alaska Codes, p. 137; Comp. Laws 1913, §§ 379, 175.

**Fees for recorder, penalty for failure to pay over—Recording notices of location of mining claims—Rules of mining districts—Mining district recorder—Mining district records.**

§ 16. Any clerk or commissioner authorized to record any instrument who having collected fees for so doing fails to record such instrument shall account to his successor in office, or to such person as the court may direct, for all fees received by him for recording any instrument on file and unrecorded at the expiration of his official term, or at the time he is required to transfer his records to another officer under the direction of the court. And any clerk or commissioner who fails, neglects, or refuses to so account for fees received and not actually earned by the recording of instrument shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned for not more than one year, or until fees received and unearned as aforesaid shall have been properly accounted for and paid over by him, as hereinbefore provided. And in addition such fees may be recovered from such clerk or commissioner or the bondsmen of either, in a civil action which shall be brought by the district attorney, in the name of the United States, to recover the same; and the amount when recovered shall be by the court transferred to the successor in office of such recorder, who shall thereupon proceed to record the unrecorded instruments; provided, miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, millsites, and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder, to act as such until a recorder therefor is appointed by the court; provided further, all records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district

within six months from the passage of this act. Alaska Codes, p. 8; Carter's Annot. Alaska Codes, p. 138; Comp. Laws 1913, § 380.

For territorial legislation with respect to recording of certificates of location, see act of territorial legislature, April 30, 1913 (Sess. Laws 1913, pp. 288, 289), *post*, p. 2429.

**Mining laws extended to Alaska—Certain tide-lands subject to exploration for minerals—Mining district regulations—Lands below low tide subject to mineral exploration under regulations of secretary of war—Exclusive permits prohibited—Right to dump tailings into or pump from sea preserved.**

§ 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the district of Alaska; provided, that subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets on Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intention to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law; provided further, that the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the secretary of war authorizing any person or persons, corporation, or company to excavate or mine under any of said waters below low tide and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the secretary of war may prescribe for the preservation of order and the protection of the interests of commerce, such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," shall not apply to mineral lands or townsites. Alaska Codes, p. 9; Carter's Annot. Alaska Codes, p. 139; Comp. Laws 1913, § 129.

For supplemental territorial legislation affecting the location of lode and placer claims, see act of territorial legislature, April 30, 1913 (Sess. Laws 1913, pp. 283–291), *post*, p. 2425.

*An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes.*

[30 Stats. at Large, p. 409. Approved May 14, 1898.]

**Railroad right of way—Right to minerals not included—Mining operations not to interfere with operation of road.**

§ 2. That the right of way through the lands of the United States in the district of Alaska is hereby granted to any railroad company, [and after making provision for the acquisition of incidental rights, is the following]; provided, that nothing herein contained shall be so construed as to give such railroad company, its lessees, grantees, or assigns, the ownership or use of minerals, including coal, within the limits of its right of way, or of the lands hereby granted; provided further, that all mining operations prosecuted or undertaken within the limits of such right of way or of the lands hereby granted shall, under rules and regulations to be prescribed by the secretary of the interior, be so conducted as not to injure or interfere with the property or operations of the road over its said lands or right of way. Comp. Laws 1913, § 47.

**Mining rights of Canadian citizens.**

§ 13. That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said district of Alaska; and the secretary of the interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. Carter's Annot. Codes, p. 461; Comp. Laws 1913, § 176.

Section 13 of this act is of no force, as is pointed out in the instructions of the land department, under date of June 8, 1898, 27 L. D. 248, 267.

(Sections 53, 54 and 55 of these instructions are given, *post*, in their appropriate place.)

The act of March 3, 1903, 32 Stats at Large, pp. 1028–1030, amended the homestead laws applicable to Alaska and provided "that no title shall be obtained hereunder to any of the mineral or coal lands of the district of Alaska." The act of May 17, 1906, 34 Stats. at Large, p. 197, authorized the secretary of the interior to allot homesteads not exceeding one hundred and sixty acres of nonmineral land to natives of Alaska. For nonmineral affidavit see 35 L. D. 440.

*An act to amend the laws governing labor or improvements upon mining claims in Alaska.*

[Act March 2, 1907 (34 Stats. at Large, 1243).]

**Annual improvements required on mining claims—Filing affidavits—Contents—Prima facie evidence of performance of work—Forfeiture—Officer before whom affidavits may be made—Time of filing and fee.**

That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be *prima facie* evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed. Comp. Laws 1913, § 162.

By act of the territorial legislature, April 30, 1913 (Sess. Laws 1913, p. 283), the value of annual improvements was required to be computed on basis of wages for similar work current in the locality. See *post*, p. 2426.

Section 1, *supra*, re-enacted as territorial legislation. Id.

§ 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for

the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded.

*An act extending the time in which to file adverse claims and institute adverse suits against mineral entries in the district of Alaska.*

[Act June 7, 1910 (36 Stats. at Large, 459).]

In the district of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes may be instituted at any time within sixty days after the filing of said claims in the local land office. Comp. Laws 1913, § 163.

Instructions under this act, *post*, p. 2409.

*An act to modify and amend the mining laws in their application to the territory of Alaska, and for other purposes.*

[Act August 1, 1912 (37 Stats. at Large, 242).]

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that no association placer mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

§ 2. That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer mining claims for any one principal or association during any calendar month, and no placer mining claim shall hereafter be located in Alaska except under the limitations of this act.

§ 3. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer mining claims in any calendar month: Provided, that one or both of such locations may be included in an association claim.

§ 4. That no placer mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

§ 5. That any placer mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

Act referred to in text: §§ 448, 450.

Instructions under this act, see *post*, p. 2410.

By act of the territorial legislature, April 30, 1913 (Sess. Laws 1913, p. 283), the requirement for a written and recorded power of attorney as authority for an agent to locate was extended to all mining claims. See *post*, p. 2425.

## COAL LANDS IN ALASKA.

*An act to extend the coal-land laws to the district of Alaska.*

[Act June 6, 1900 (31 Stats. at Large, p. 658).]

That so much of the public land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes. Carter's Annot. Codes, p. 464.

Act referred to in text: § 497.

Text of above sections of Rev. Stats., *ante*, pp. 2345–2348.

Coal lands generally: §§ 495–509.

## COAL MINES ON UNSURVEYED LANDS.

*An act to amend an act entitled "An act to extend the coal-land laws to the district of Alaska," approved June sixth, nineteen hundred.*

[Act April 28, 1904 (33 Stats. at Large, p. 525).]

That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

§ 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located

by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field-notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

§ 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

§ 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska. Comp. Laws 1913, §§ 187–190.

*An act to encourage the development of coal deposits in the territory of Alaska.*

[Act May 28, 1908 (35 Stats. at Large, p. 424).]

**Consolidation of locations of coal lands—United States has preference right to purchase for use of army and navy—Lands forfeited if part of unlawful combination or trust.**

That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in

the territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the secretary of the interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs, or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: Provided, that no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

§ 2. That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this act as may be necessary for the use of the army and navy, and at such reasonable and remunerative price as may be fixed by the president; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the court of claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.

§ 3. That if any of the lands or deposits purchased under the provisions of this act shall be owned, leased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract of conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by proceedings instituted by the attorney-general of the United States in the courts for that purpose.

§ 4. That every patent issued under this act shall expressly recite the terms and conditions prescribed in sections two and three hereof. Comp. Laws 1913, §§ 197–200. See Opinion, 38 L. D. 86, and United States v. Darghton, 186 Fed. 226; United States v. Munday, 186 Fed. 375.

**Miscellaneous federal legislation.**

1. Act of June 25, 1910 (36 Stats. at Large, 848), providing for miners' liens in Alaska and prescribing procedure for filing and fore-

closing the same. Comp. Stats. 1913, §§ 163–174. Superseded by act of territorial legislature, April 30, 1913 (Sess. Laws 1913, p. 308).

B. Land Department Regulations Concerning Mining in Alaska.

**Mining regulations extended to Alaska.**

§ 1. In pursuance of the eighth section of the act of congress, approved May 17, 1884, entitled "An act to provide a civil government for Alaska" (23 Stats. at Large, 24), it is hereby prescribed that the rules and regulations of the general land office and department of the interior governing the administration of the mining laws of the United States, be adopted for and extended to the district of Alaska, so far as the same may be applicable.

**Publication of notices may be made in Washington until newspapers are established in Alaska.**

§ 2. Notices required by mining laws and regulations to be published in a newspaper nearest the claim, may, until newspapers are established in Alaska, be published in some suitable newspaper or newspapers printed in Washington Territory, to be designated by the *ex-officio* register of the land district of Alaska.

**Nonmineral lands not subject to survey or disposal.**

§ 3. No public lands other than specific mineral claims are subject to survey or disposal in said district.

This section is rendered obsolete in so far as the land laws enumerated above have been extended to the district.

**Officials of land office subject to same regulations as similar officers in United States.**

§ 4. The *ex-officio* register, receiver, and surveyor-general, while acting as such, and their clerks and deputy surveyors, will be deemed subject to the laws and regulations governing the official conduct and responsibilities of similar officers and persons under general statutes of the United States.

**Land officers subject to supervision of the commissioner.**

§ 5. The commissioner of the general land office will from time to time direct the *ex-officio* land officers in the proper discharge of their official duties, and will exercise the same general supervision over the execution of the laws as are, or may be, exercised by him in other mineral districts. 4 L. D., p. 128. Issued July 28, 1885.

What is said in sections 2, 4, and 5, *supra,* concerning the *ex-officio* land officers applies to the actual officers since the provision for the appointment of a register, receiver, and surveyor-general of the land district of Alaska (30 Stats. at Large, p. 215).

*Instructions of June 8, 1898.*

**Citizens of Dominion of Canada—Rights under section 13 of act of May 14, 1898, extending homestead laws to Alaska.**

§ 53. By the laws of the Dominion of Canada citizens of the United States are, with all other persons over eighteen years of age, permitted to lease mineral lands in British Columbia and the Northwest Territory upon the payment of a certain royalty to the general government, but the laws of that dominion do not authorize the purchase of mineral lands in British Columbia or the Northwest Territory.

§ 54. The existing laws of the United States do not make any provision for the leasing of mineral lands in Alaska either to citizens of the United States or to others, but they do provide for and authorize the purchase of such lands in Alaska by our own citizens.

§ 55. Since this section accords to native-born citizens of Canada "the same mining rights and privileges" accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, and since under the laws of the Dominion of Canada the only mining rights and privileges accorded to citizens of the United States are those of leasing mineral lands upon the payment of a stated royalty, and since the laws of the United States do not accord to its own citizens the right or privilege of leasing mineral lands in Alaska, and since this section also provides that "no greater rights shall be thus accorded" to citizens of the Dominion of Canada "than citizens of the United States or persons who have declared their intention to become such may enjoy in such district of Alaska," it results that for the time being this section is inoperative. 27 L. D., p. 267.

*Instructions of June 25, 1910.*

Your attention is directed to the act of congress approved June seventh, nineteen hundred and ten (Public, No. 198), copy herewith, relating to the filing of adverse claims, and the institution of suits thereon, against mineral applications in the district of Alaska.

**Extension of time for filing adverse claims.**

The act provides that adverse claims may be filed at any time during the sixty-day period of publication or within eight months thereafter. This provision applies to any application where the sixty-day period of publication ended with, or ends after, June seventh, nineteen hundred and ten, and operates to enlarge by eight months additional the time within which an adverse claim may be filed. This provision does not apply to any application under which the sixty-day period of publication ended with, or before, June sixth, nineteen hundred and ten, for, if no adverse claim was seasonably filed in such case, the statutory

assumption that none existed has arisen, upon the expiration of the publication period, in favor of the applicant.

**Extension of time within which adverse suits may be instituted.**

It is also provided by the act that adverse suits may be instituted at any time within sixty days after the filing of adverse claims in the local land office. This provision applies to any adverse claim under which the thirty-day period fixed under the former law for commencing the adverse suit was running on, or expired with, June seventh, nineteen hundred and ten, and enlarges such time to a period of sixty days, and also to any adverse claim which is seasonably filed on, or after, June seventh, nineteen hundred and ten. Such provision has no operation in a case where, under the former law, the thirty-day period within which to institute suit on an adverse claim expired with, or ended before, June sixth, nineteen hundred and ten, and the sixty-day publication period also expired on, or before, June sixth, nineteen hundred and ten.

You will exercise the greatest care in applying the provisions of the act, and will allow no mineral entry until after the expiration of the full period granted for the filing of adverse claims. For example, on any application under which the publication period ended with, or after, June seventh, nineteen hundred and ten, no entry will in any event be allowed until after the expiration of the eight-months' period following the publication period. 39 L. D. 49.

*Instructions of October 29, 1912.*

**Placer claims.**

Your attention is directed to the act of congress approved August first, nineteen hundred and twelve (Public, No. 250), entitled "An act to modify and amend the mining laws in their application to the territory of Alaska, and for other purposes," a copy of which appears below.

It is important to note that this act applies exclusively to placer mining claims located in Alaska on or after August first, nineteen hundred and twelve. It does not in any manner relate to lode mining claims, or to placer mining claims located prior to said date. The terms of the act lay strict limitations and conditions with respect to placer locations made upon or after said date.

Section one of the act provides that no association placer claim shall be located after August first, nineteen hundred and twelve, in excess of forty acres. This limitation is positive whatever may be the number of persons associated together or whatever the local district rules or regulations may permit.

Said section further provides that on every placer mining claim located in Alaska after the passage of the act, and until patent therefor has been issued, not less than one hundred dollars' worth of labor

must be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof included in the claim. This means that the *first* annual expenditure on such a placer mining location must be accomplished for and during the calendar year in which the claim is located, instead of during the calendar year succeeding that in which the location is made. Moreover, the amount of annual expenditure is dependent upon the size of the claim, it being required that at least one hundred dollars must be expended for each twenty acres, or excess fraction thereof, embraced in the location.

By section two it is provided that no person, as attorney or agent for another, may locate any placer mining claim unless duly authorized by a power of attorney properly acknowledged and recorded in some recorder's office within the judicial division where the location is made. Furthermore, an authorized agent or attorney can act in making locations of placer mining claims for only two individual principals or one associate principal during any calendar month and during that period may not lawfully locate more than two claims for any one principal either individual or association. No placer claim can lawfully be located except in compliance with and under the limitations of the act.

In order that the land department may be fully advised in the premises, the following requirements must be met with regard to applications for placer mining claims located in Alaska on or after August first, nineteen hundred and twelve:

a. Where location is made by agent or attorney the power of attorney must be in writing and must be executed and acknowledged in accordance with the laws of the territory of Alaska or of the state, territory, or district in which it shall be executed. It must be recorded in the proper recorder's office as prescribed by the act. The application for patent must be accompanied by a certified copy of such power of attorney which must show the recordation thereof, but it will be sufficient if such certified copy is attached to and made a part of the abstract of title.

b. One of the principal purposes of the act is to limit the number of placer mining locations made in Alaska through agents or attorneys. An agent or attorney cannot at one time represent more than *two individuals* or *one association* under powers of attorney. A duly authorized agent may make two locations for each of two individual principals, or for one association principal, during any calendar month but he can make no further locations during that month for those or other principals.

The application for patent should accordingly be accompanied by the sworn statement of the agent or attorney setting forth specifically the names of all placer mining claims, together with the date of location and names of the locators, which were located or attempted to be located

by him under powers of attorney during the calendar month in which the placer claim applied for was located.

c. By section three it is prescribed that no person shall directly locate, or through an agent or attorney cause or procure to be located, for himself more than two placer mining claims in any calendar month, provided, however, that one or both of such locations may be included in an association claim.

Whenever a person or an association has participated in the locating of placer mining claims in Alaska to the extent of two such claims in any calendar month, such person or such association thereby exhausts the right to make placer location for that month. The application for patent, therefore, for a placer mining claim located in Alaska on or after August first, nineteen hundred and twelve, must contain or be accompanied by a specific statement, under oath, as to each locator who had an interest therein showing specifically and in detail all placer locations made by him, or in which he was associated, either directly or through any agent or attorney, during the calendar month in which the claim applied for was located. If no locations in excess of those permitted by law were made during such calendar month a specific statement, under oath, to that effect, should be submitted. This showing must be made in addition to that hereinabove required of the agent himself.

Section four of the act prohibits the patenting of any placer mining claim located in Alaska after the passage of the act, which contains a greater area than that fixed by law or which is longer than three times its greatest width. The surveyor-general will be careful to observe the above requirements and will not approve any survey of a placer location which does not in area and dimensions conform to the provisions of law.

By section five of the act it is declared that any placer mining claim attempted to be located in violation of the provisions and limitations of the act shall be null and void and the whole area covered by such attempted location may be located by any qualified person the same as if no such prior attempted location had been made. Consequently, any attempted placer location not made in conformity with the act is a nullity and the land covered thereby is open for and subject to proper location at any time.

It will be observed that the act does not affect the number of claims, lode or placer, and if placer whether located before or after the passage of the act, which may be included in a single application proceeding. 41 L. D. 347.

INSTRUCTIONS AND REGULATIONS RELATING TO COAL LANDS IN ALASKA.

*Instructions of June 27, 1900.*

**Coal lands in Alaska—Entries and surveys.**

Your attention is directed to the following act of congress, approved June 6, 1900, extending the coal land laws to the district of Alaska:—

An act extending the coal land laws to the district of Alaska.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that so much of the public land laws of the United States are hereby extended to the district of Alaska as relate to coal lands,—namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes."

Under the coal land law, sections 2347 to 2352, inclusive, of the Revised Statutes and the regulations thereunder, issued July 31, 1882, coal land filings and entries must be *by legal subdivisions*, as made by the regular United States survey.

Section 2401 of the Revised Statutes, as amended by act of August 20, 1894, is as follows:—

"§ 2401 [as amended by act of August 20, 1894]. When the settlers in any township not mineral or reserved by the government, or persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or when the owners or grantees of public lands of the United States under any law thereof desire a survey made of the same under the authority of the surveyor-general, and shall file an application therefor in writing and shall deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey, together with all expenditures incident thereto without cost or claim for indemnity on the United States it shall be lawful for the surveyor-general, under such instructions as may be given him by the commissioner of the general land office, and in accordance with law, to survey such township or such public lands owned by said grantees of the government and make return thereof to the general and proper local land office; provided, that no application shall be granted unless the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys."

Under said section 2401, as amended, persons and associations lawfully possessed of coal claims, upon unsurveyed lands, may have such claims surveyed, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys.

Although the system of public land surveys was extended to the district of Alaska by a provision contained in the act of congress approved March 3, 1899 (30 Stats., p. 1098), no township or subdivisional surveys have been made, nor have any standard lines or bases for township and subdivisional surveys been established, within the district; therefore, until the filing in your office of the official plat of survey of the township, no coal filing nor entry can be made. 30 L. D., pp. 368, 369.

*Regulations of April 12, 1907.*

These regulations supplanted the regulations of July 18, 1904, contained in 33 Land Decisions, 114–119.

1. Persons or associations of persons locating or entering coal lands in the district of Alaska under the provisions of the act of April 28, 1904 (33 Stats. at Large, 525), amendatory of the act of June 6, 1900 (31 Stats. at Large, 330), are required to possess the qualifications of persons or associations, making entry under the general coal land laws of the United States, and are subject to the same limitations.

2. The lands must be vacant and unappropriated, and must contain deposits of coal, and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

3. Entry by an individual may be made only by a person above the age of 21 years, who is a citizen of the United States, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal land law.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than $5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law may enter or hold other coal lands thereunder. The right so to enter or hold is exhausted, whether an entry embraces in any instance the maximum area allowed by the law or less.

6. There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for

profit and sale of the coal, or beyond the *opening and improving* of the mine as a condition precedent to the right to apply for patent.

7. The requirement of the statute with respect to the form of the tract sought to be entered is construed to mean that the boundary lines of each entry must be run in cardinal directions, i. e., due north and south and east and west lines, by reference to a true meridian (not magnetic), with the exception of meander lines on meanderable streams and navigable waters forming a part of the boundary lines of a location. Those meander lines which form part of the boundary of a claim will be run according to the directions in the Manual of Surveying Instructions, but other boundary lines will be run in true east and west and north and south directions, thus forming rectangles, except at intersections with meandered lines.

8. The permanent monuments to be placed at each of the four corners of the tract located may consist of—

First. A stone at least 24 inches long, set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside.

Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground, and surrounded by a substantial mound of stone or earth.

Third. A rock in place; and, whenever possible, the identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, or other objects, permanent objects being selected for bearings whenever possible.

9. It is further provided by the first section of the act that within one year from the date of the passage of the act or within one year from making the location there shall be filed for record in the recording district and with the register and receiver of the land district in which the land is situated a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same. In other words, the notice shall contain a complete description in every particular of the claim as it is marked and monumented upon the ground.

10. By the second section of the act the locator or his assigns is allowed three years from the date of filing the notice prescribed in the first section of the act within which to file an application with the local land officers for patent for the land claimed. It will thus be seen that persons or associations of persons claiming coal lands in that district at the date of the passage of the act have four years from location or from the date of the act within which to present their applications for patent.

11. Persons or associations of persons who fail to record their notices within the time prescribed by the first section of the act, or fail to

file application for patent in the time prescribed by the second section, forfeit their rights to the particular tract located.

12. With the application for patent the claimant must file a certified copy of the plat of survey and field-notes thereof made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor-general for the district of Alaska. Under this clause of the act it will be allowable for the claimant, at his own expense, to procure the making of a survey by one of the officials mentioned without first making application to the surveyor-general, but the survey when made is to be submitted to and approved by the surveyor-general and by him numbered serially.

13. The survey must be made in strict conformity with or be embraced within the lines of the location as appears from the record thereof with the recorder in the recording district, and must be made in accordance with the regulations relative to lode and placer mining claims so far as they are applicable. This precludes the calculation of connection with a United States mineral monument or with a corner of the public land survey, if there be one, or of any other lines of the survey, through prior surveys, unless it is satisfactorily shown in the return that such lines were retraced and found to be correct.

The field-notes, plat, and return of the surveyor must show the actual conditions existing at the time the survey is made. There should be noted all development work performed and mining improvements made by the claimant, or his assignors, such as surface work, shafts, inclines, tunnels, drifts, cross-cuts, buildings, machinery, etc., and the same should be described with particularity and detail as to dimensions, character, and estimated value. All improvements must be located by courses and distances from corners of the survey, or from described points on the boundary lines. A similar showing should be made as to the work done and improvements made, if any, by parties other than the claimant or his assignors, and it should be ascertained and shown whether such work and improvements have been appropriated and utilized by the claimant.

Where it is sought to consolidate claims or locations pursuant to the act of May 28, 1908 (35 Stat. 424), each individual claim or location will be properly surveyed and the requisite showing as to work and improvements returned for each separate location included in the consolidated claim. Amended September 26, 1911 (40 L. D. 277).

14. Upon the presentation of an application for patent, if no reason appears for rejecting it, it will be received by the register and receiver and the claimant required to publish a notice thereof for the period of sixty days in a newspaper in the district of Alaska published nearest the location of the particular lands, and to cause a copy thereof, together with a certified copy of the official plat or sur-

vey, to be posted and remain posted throughout the period of publication in a conspicuous place upon the land applied for, and the register will post a copy of such notice and official plat in his office for the same period. When the notice is published in a weekly newspaper, nine consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

15. The notice so published must embrace all the data given in the notice posted upon the claim and in the local land office. In addition to such data, the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field-notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, if there is one, and fix the boundaries of the claim by courses and distances.

The publication in the newspaper and the posting upon the land and in the local land office must cover the same period of time.

16. Upon the expiration of the sixty-day period prescribed the claimant may file in the local land office a sworn statement from the office of publication, to which shall be attached a copy of the notice published, to the effect that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during the sixty-day period of publication, giving the dates. The register will also file with the record a certificate showing that the notice and plat were posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act, which is $10 per acre in all cases.

17. The proviso to the second section of the act is as follows:

That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

The term "shore" is defined to mean the land lying between high and low water marks of any navigable waters within said district.

18. Section 3 provides for the assertion by any person or association of persons of an adverse claim, and requires that such adverse claim shall be filed during the period of posting and publication or within six months thereafter; that it shall be under oath, and set forth the nature and extent thereof.

19. An adverse claim may be verified by the oath of the adverse claimant, or by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated, and when verified by such agent or attorney in fact he must distinctly swear that he is such agent or attorney in fact and accompany his affidavit by proof thereof. The adverse claimant should set forth fully the nature and extent of the interference or conflict by filing with his adverse claim a plat showing his entire claim and its situation or position with relation to the one against which he claims; whether he claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance or duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or, if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and amount paid, which facts will be supported by the affidavits of one or more witnesses, if any were present at the time; and if he claims as locator, he must file a duly certified copy of the location notice from the office of the proper recorder and his affidavit of continued ownership.

20. Upon the filing of such adverse claim within the sixty-days period of posting and publication, or within six months thereafter, the party who files the adverse claim shall, under the act, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska.

21. All papers filed should have indorsed upon them the precise date of filing; and upon the filing of an adverse claim within the time prescribed by the statute all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until final adjudication of the rights of the parties. In cases of final judgment rendered the party entitled under the decree must, before he is allowed to make entry, file a certified copy thereof.

22. Where such suit has been dismissed a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient. Where no suit has been commenced against the application for patent within the statutory period, a certificate to that effect by the clerk of the territorial court having jurisdiction will be required.

23. In connection with the foregoing, it is to be borne in mind that by section 4 of the act it is declared:

That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

24. An assignment to a qualified person of a preference right of entry under the act of April 28, 1904, it will be recognized when properly executed. Proof and payment by the assignee must be made, however, in the same manner and within the same time as though there had been no assignment.

25. The following forms for notice of location and application for patent should be used:

NOTICE OF LOCATION.

I, —— ——, of ——, having on the —— day of ——, 19——, opened and improved a coal mine on the following-described tract (here describe the lands by metes and bounds in rectangular form with north and south boundary lines run according to the true meridian, and a reference to such natural or permanent objects as will readily identify the same), do hereby locate the same as provided by the Alaska coal land act of April 28, 1904, (33 Stats., 525); and I do solemnly swear that I am a citizen of the United States (or have declared my intention to become a citizen of the United States); that I am over the age of 21 years; that I have never either as an individual or as a member of an association held, except ——, or purchased any coal lands of the United States; that I have remained in actual possession of said land continuously since the —— day of ——, 19——; that I have expended in labor and improvements on said mine the sum of —— dollars, the labor and improvements being as follows (here describe the nature and character of such improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described lands and with each and every portion thereof; that my knowledge of said lands is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper or other minerals. So help me God.

—— ——.

Dated ——, 19——.
[Jurat.]

APPLICATION FOR PATENT.

I, —— ——, claiming under the provisions of the act of April 28, 1904 (33 Stats., 525), amendatory of the act of June 6, 1900 (31 Stats., 658), extending the coal-land laws to the district of Alaska, do hereby apply to purchase the lands described in the accompanying field-notes and plat and subject to sale at the district land office at ——, Alaska; and do solemnly swear that my title to said tract is as follows: ——— as will more fully appear by the certified copy of location notice and abstract of title filed herewith; that I am above the age of 21 years, and a citizen of the United States; that I have not hitherto held, except ——, or purchased, either as an individual or as a member of an association, any coal lands under the provisions of the coal land laws; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of —— dollars, the nature of said improvements being as follows: ——; that I am now in the actual possession of said mines and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the

character of said described land, and with each and every portion thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, copper, or other minerals. So help me God.

—— ——.

[Jurat.]

26. The notice of location and the application for patent, the forms of which are given above, may be sworn to by the claimant before any officer authorized by law to administer oaths, but the authority of said officer must be properly shown.

27. Any party duly qualified under the law, *after* swearing to his notice of location, or application for patent, may by a sufficient power of attorney duly executed under the laws of the state or territory in which such party may be then residing, empower an agent to file with the register of the proper land office the notice of location or application for patent, and also authorize him to make payment for and entry of the lands in the name of such qualified party; and when such power of attorney shall have been filed in the local land office such agent may act thereunder as indicated, [but no person will be permitted to act as such agent for more than four applicants].

By circular letter of March 20, 1909, the words inclosed in brackets in this section were eliminated and the paragraph as amended contains no limitation as to the number of applicants for whom a duly qualified agent may act. 37 L. D. 508.

28. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, any qualified person may make the required affidavit as to its character; but whether this affidavit is made by the claimant or by another it must be corroborated by the affidavits of two disinterested and credible witnesses having personal knowledge of the facts.

29. The "Rules of practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

30. Local officers will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with number one and thereafter proceeding consecutively in the order of their reception.

Where a series of numbers has already been commenced by sale of coal lands, they will continue the same without change. 35 L. D. 673–680.

*Instructions of May 16, 1907.*

1. Under the order of November 12, 1906, withdrawing lands in Alaska from entry location, or filing under the coal land laws, and subsequent modifications in said order, no lands in Alaska known to contain workable deposits of coal can be entered, located, or filed upon while such orders remain in force, except as hereinafter provided.

2. All qualified persons or associations of qualified persons who had within one year prior to November 12, 1906, in good faith, made legal and valid locations under the act of April 28, 1904, may file notices of such locations in the manner and within the time prescribed by said act, if such notices have not already been filed and such locations have not been abandoned or forfeited; and they or any other person or persons to whom they may lawfully assign their rights after such notices have been filed may thereafter proceed to make entry and obtain patent within the time and in the manner prescribed by law.

3. In computing the time within which notices of location may be filed under the preceding paragraph, the time intervening between November 12, 1906, and August 1, 1907, will not be taken into consideration or counted, but such notices may be filed within one year from the date of location, exclusive of such time.

4. All qualified persons or associations of qualified persons who may have in good faith legally filed valid notices of location under the act of April 28, 1904, prior to November 12, 1906, and the *bona fide* qualified assignees of such persons, may make entry and obtain patent under such notices within the time and in the manner prescribed by the statute if they have not abandoned their right to do so.

5. In computing the time within which persons or associations of persons mentioned in the preceding paragraph may apply for patent, the time intervening between November 12, 1906, and the day on which they receive the written notices given by you as hereinafter required will not be considered or counted, and such applications may be made at any time within three years from the date on which such notices of location were filed, exclusive of such time.

6. You are directed to at once notify all persons or associations of persons who have filed notices of location in your office, including those who have pending applications for patent, and all persons or associations of persons holding as assignees under such locations who have notified you of such assignments, of their right to proceed in the manner herein prescribed and authorized, and to furnish them with a copy of these instructions. These notices must be served either personally or by registered mail, and you should carefully preserve with the record in each case the registry return receipt or other evidence of such notice.

7. In all cases where you publish notice of applications for entry or patent under the coal land laws or under any other law, you will at once mail a copy of said notice to a special agent assigned to duty in Alaska. Should said agent thereafter file in your office a protest against the validity of the location or claim embraced in any such application you will defer action upon such application until said protest is withdrawn or appropriate action is taken thereon. 35 L. D. 572, 573.

*Instructions of June 27, 1908.*

The instructions of the General Land Office, dated March 3, 1908, relative to the time within which applications to purchase coal lands in Alaska under the act of April 28, 1904 (33 Stat. 525), must be perfected is amended to read as follows:

Your attention is called to the fact that the coal-land law of April 28, 1904 (33 Stat., 525), provides that locators or their assigns may, at any time within three years after filing the notice prescribed by the first section of the act, make application for patent for the land claimed.

This does not mean that if the application is filed at an earlier time than that allowed, the claimant may defer payment for his claim and making entry for a period of time which added to the time between filing the location notice and submitting the application for patent, will equal three years.

When the claimant files his application for patent he waives the unexpired portion of the three years fixed by the statute and must, thereafter, diligently proceed to make publication and submit the proofs prescribed by the statute and the regulations.

Paragraph 16 of the regulations of April 12, 1907 (35 L. D., 673), provides that payment and entry may be made not earlier than six months after the expiration of the period of publication. The law does not contemplate that this time be extended an unreasonable period at the option of the claimant, but that after the filing of the application, the case proceed regularly to entry. Accordingly, should the specified proofs and purchase price be not furnished and tendered within six months from the expiration of the six months within which adverse claims may be filed, or within six months after the final termination of adverse proceedings instituted under section 3 of the act, you will reject the application subject to appeal: *Provided,* that the period of six months herein fixed within which to perfect entry shall be allowed in case of pending applications which have not been perfected within the ninety days specified by the instructions of March 3, 1908, the time to run from date hereof.

This is not intended in any way to modify the circular instructions of May 16, 1907, copy inclosed herewith. 36 L. D. 548, 549.

For instructions of March 3, 1908, see 36 L. D. 548.

*Instructions of July 11, 1908.*

Herewith is a copy of act of Congress approved May 28, 1908, Public No. 151, relating to existing unpatented coal claims in the district of Alaska.

CONSOLIDATION OF CLAIMS, MAXIMUM AREA.

The said act provides a method whereby qualified persons, their heirs or assigns, who initiated coal claims in Alaska prior to November 12, 1906, may consolidate their claims through the means of associations or corporations which may perfect entry and acquire title to contiguous locations, such consolidated claims not to exceed 2,560 acres of contiguous lands nor to exceed in length twice the width of the tract thus consolidated and applied for.

QUALIFICATIONS OF APPLICANTS FOR CONSOLIDATED CLAIM.

When application is made by an association of persons, each member thereof must be shown to be qualified to make entry under the coal land laws applicable to Alaska, and to be the owner, by location, inheritance, or purchase, of an undivided interest in the consolidated claim. Proof of the qualifications of the applicants may consist of their own affidavits. The application for patent may be executed and filed by the duly authorized agent of the members of the association.

A corporation applying to consolidate its claims must show at date of application that not less than 75 per cent of its stock is held by persons qualified to enter coal lands in Alaska, and to this end each such application must be accompanied by a list of the stockholders, showing their respective holdings of stock in the corporation, and the personal affidavits of those holding such 75 per cent of the capital stock, showing their qualifications under the law. Applications by corporations must be signed by the president and secretary and attested by the corporate seal. All applications may be upon Form 4–367, modified to suit conditions.

PENDING ENTRIES.

Claims embraced in unpatented entries, if the entryman shall so elect, may be consolidated into a single entry under this act, upon presentation of a proper application therefor, within twelve months from date hereof. In the event of such consolidation, no further payment, publication of notice, nor any new or additional survey of the claims embraced in the consolidated entry will be required; but the application must be accompanied by a plat of the claims as consolidated, by proof of the qualifications of the applicant, and by evidence of the assignments of the claims to the applicants.

ASSIGNMENTS.

Assignments to individuals or corporations under the provisions of the act of May 28, 1908, must be executed in accordance with local requirements, and all applications be accompanied by abstracts of title properly certified.

SURVEYS.

Where locations already surveyed are sought to be consolidated, the application must be accompanied by a plat showing the separate locations included in the consolidation and their relation to each other. One entry may then be made for the consolidated claim. Where unsurveyed claims are consolidated, the survey may describe the exterior limits of the consolidated claim, as in the case of the survey of one location, but the field-notes of survey must be accompanied by duly certified copies of the location notices of the included claims, and must show that the survey is made substantially in accordance with the aggregate locations. Consolidated claims need not be surveyed in perfect squares or parallelograms, but the length of the consolidated claim must not exceed twice the width, length and width to be measured in straight lines.

TIME WITHIN WHICH APPLICATION TO ENTER MUST BE MADE.

Application for patent for consolidated claims may be accepted if filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension between November 12, 1906, and August 1, 1907 (Circular, May 16, 1907, 35 L. D. 572). In case of consolidation of claims, including both claims for which no application for patent has been filed and claims for which applications have been made, the application under the provision of this act must be filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension hereinbefore mentioned. In case of consolidation of claims for all of which applications for patent have already been filed, final proof, payment, and entry must be made within six months after the expiration of the period of six months prescribed by section 3 of the act of April 28, 1904, for the filing of adverse claims has elapsed in case of all the included applications or within six months after the final adjudication of the rights of the parties in adverse suits instituted with respect to any or all of such included applications: Provided that in those cases wherein the time here specified has expired applications to consolidate must be filed within six months from date hereof.

SECTION 3 OF ACT.

Inasmuch as section 3 deals exclusively with such coal lands or deposits as shall have been *purchased* under this act, its interpretation seems more properly to fall within the province of the department

of justice, and it is deemed inadvisable for this department to attempt at this time to define its provisions.

ACT APRIL 28, 1904 [33 STATS. 525].

So far as not in conflict with or superseded by the act of May 28, 1908, the act of April 28, 1904, will govern the survey, application, and entry of the coal claims described in these instructions.

PATENTS.

Patents issued under the provisions of the act of May 28, 1908, will contain recitals of the terms and conditions imposed by sections 2 and 3 of the act. 37 L. D. 20.

## II. TERRITORIAL LAWS.

The passage of the act of congress of August twenty-fourth, nineteen hundred and twelve,[1] creating a legislative assembly for Alaska and conferring legislative power thereon, authorizes the territorial legislature to enact laws supplementing the federal mining laws to the same extent as the states,[2] subject, however, to the right of congress to disapprove of them. Until so disapproved they are effective, provided, of course, that they are not in conflict with the federal laws.

The text of this treatise had been set up in type before the convening of the first territorial legislature, and no opportunity was thus afforded to assimilate and comment on territorial legislation in the main body of this work.

At its first session the legislature passed an elaborate mining law, the text of which is appended, with such comment in the form of notes at the end of each section as the author deems pertinent.

The following is the text of the law:[3]—

[1] 37 Stats. at Large, p. 512.
[2] *Ante*, § 64.
[3] Sess. Laws of Alaska 1913, p. 283.

### A. ACT OF APRIL 30, 1913, RELATING TO THE LOCATION AND DEVELOPMENT OF MINING CLAIMS IN ALASKA.

*An act to supplement the mining laws of the United States in their application to the territory of Alaska; providing for the location and possession of mining claims in Alaska and repealing all acts and parts of acts in conflict herewith to the extent of such conflicts.*

[Approved April 30, 1913 (Sess. Laws of Alaska, 1913, p. 283).]

**General provisions concerning lode and placer mining claims.**

§ 1. That no person shall hereafter locate any mining claim in the territory of Alaska as attorney for another unless he is duly authorized

thereto by a power of attorney in writing, which shall be witnessed by two witnesses but need not be acknowledged, and recorded in the office of the recorder in whose precinct such location is made, previous to the date of the initiation of such location.[1]

[1] Federal law affected placers only. See text, § 450.

§ 2. That the value of work or labor done under the provisions of this act shall be computed on the basis of the wage for similar work current in the precinct wherein the claim is situate.[2]

[2] As to validity of such provision, see text, §§ 250, 626, 635.

§ 3. That during each year and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit of each and every lode mining claim, and one hundred dollars' worth of labor shall be performed or improvements made on or for the benefit of each and every twenty acres or fractional part thereof contained in any placer claim hereafter located and after the thirty-first day of December, nineteen hundred and fourteen, one hundred dollars' worth of labor shall be performed or improvements made on or for the benefit of each and every twenty acres, or fractional part thereof contained in any claim heretofore located, and such work shall be known as "annual assessment work."[3] The owner of such claim or some other person having knowledge of the facts, shall make and file with the recorder of the precinct wherein such claim is situate, an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars for each and every twenty acres or fractional part thereof contained in such claim as aforesaid and specifying the character of such labor or improvements.

[3] The validity of this provision requiring one hundred dollars' worth of labor for each twenty acres of an association placer location, especially in the case of those located prior to this enactment, will doubtless be seriously questioned. For a discussion of such legislation generally, see §§ 248–251, 626, and 635 of the text. The federal statute (§ 2324, Rev. Stats.) provides that "*not less than* one hundred dollars' worth of labor shall be performed annually." Congress could, without much doubt, increase the required amount, and in the absence of such action by congress, why may not the legislatures of the states and territories?

Such affidavit shall set forth the following:

(a) The name or number of the claim and where situated.

(b) The number of days' work done and the character and value of the improvements made thereon.

(c) Date of the performance of such labor and making of improvements.

(d) The place where such work was done and improvements made with reference to the boundaries of such claim.

(e) At whose instance the work was done and improvements made.

(f) The actual amount paid for such work and improvements and by whom paid when such work was not done or improvements made by the owner.

Such affidavit shall be filed with the precinct recorder not later than ninety days after the close of the calendar year in which the work was done or improvements made. For the filing, recording and indexing of such affidavit the recorder shall collect the sum of one dollar and fifty cents. Upon failure to comply with all the provisions of this section such claim shall become forfeited and open to location by others as if no location had been made.[4]

[4] Re-enacts federal act of March 2, 1907 (34 Stats. at Large, 1243), Appendix, *ante*.

§ 4. That any person who shall make or subscribe any affidavit required to be made under the provisions of this act, knowing the statements therein contained, or any of them, to be false in whole or in part, or without knowing the statements therein contained to be true, shall be deemed guilty of perjury, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than five years.

Any person who shall induce or procure, or who shall aid in inducing or procuring another person to commit perjury, as the same is herein defined, shall be deemed guilty of subornation of perjury, and upon conviction thereof shall be punished as herein provided for perjury.[5]

[5] On the general subject of Proof of Labor, see § 636 of the text.

**Location of lode claim.**

§ 5. Any person who discovers upon the public domain of the United States, within the territory of Alaska, a vein, lode or ledge or rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, which is subject to entry and patent, under the mining laws of the United States, may, if qualified by the laws of the United States locate a mining lode upon such vein, lode or ledge, in the following manner, viz.:[6]—

[6] On the general subject of what constitutes a discovery of a vein or lode, see § 336 of the text.

§ 6. At the time of discovery he must post conspicuously at the point of discovery, a notice of location thereof, containing: (a) The name or number of the claim; (b) the name of the locator or locators; (c) the date of discovery and posting of notice as in this section provided for; (d) number of feet claimed along the course of the vein each way from the discovery post, with the width claimed on each side of the center of the vein; (e) the general course of the lode.[7]

[7] As to the preliminary notice and its posting, see §§ 350–356.

§ 7. At the time of posting the notice of location, he shall distinctly mark the location on the ground so that its boundaries can be readily traced. It shall be *prima facie* evidence that the location is properly marked if the boundaries are defined by a monument at each corner or angle of the claim, consisting of any of the following kinds: (1) A tree or post not less than three feet above the ground and three inches in diameter and hewed on the side or sides facing the claim, set at least one foot in the ground, unless solid rock should occur at a less depth, in which case the post shall be set upon such rock, and surrounded by a mound of earth or stone at least four feet in diameter by two feet in height; or (2) A stone or rock at least six inches square by eighteen inches in length set two-thirds of its length in the ground, with a mound of earth or stone alongside at least four feet in diameter by two feet in height; or (3) A boulder at least three feet above the natural surface of the ground on the upper side. Where in marking the surface boundaries of a claim any one or more of such posts or monuments shall fall by right upon precipitous ground where the proper placing thereof is impracticable or dangerous to life or limb, it shall be valid to place any such post or monument at the nearest practicable point, suitably marked to designate the proper place. Such post or monument shall be known as and be marked "witness monument."

Where any other monument, or monuments of lesser dimensions than those above described, are used, it shall be a question for the jury or court, as to whether the location has been marked upon the ground so that its boundaries can be readily traced. Whatever monument is used it must be marked with the name or number of the claim and the designation of the corner or angle by number, and the monument nearest the discovery shall be the initial post, stake or monument, and shall be stake, post or monument number one; and further, the corners or angles shall be numbered in regular rotation. If the claim is located on ground covered wholly or in part by brush, or trees, such brush shall be cut and trees marked or blazed along the lines of such claim to indicate the location of such lines; if located in an open country the boundary lines shall be marked by placing line stakes or line monuments, so as to readily lead from corner to corner of such claim.[8]

[8] As to marking the boundaries and time allowed for same, see §§ 371–374 of the text.

§ 8. Within one year from the date of discovery not less than one hundred dollars' worth of development work shall be performed within the exterior boundaries of the claim. Such work shall include the sinking of a shaft upon the vein or lode, or ledge, to be known as discovery shaft. Such shaft shall be sunk to a depth of at least ten feet, vertically, below the lowest part of the rim of such shaft at the surface, and deeper if necessary to disclose the vein located. Any open cut,

crosscut, adit or tunnel, which shall cut the vein at a depth of ten feet below the surface, shall be deemed the equivalent of such discovery shaft; and if such discovery shaft or the equivalent thereof shall require less than one hundred dollars' worth of labor for its excavation, the balance of such one hundred dollars' worth of labor shall be applied to deepening the discovery shaft, or making further horizontal extensions, or by any excavation made elsewhere upon the claim. The development work in this section required shall be known as and shall constitute location work.[9]

[9] For a discussion of the validity and character of location work generally, see §§ 343–346 of the text. This preliminary work is usually required to be done inside of sixty or ninety days, and the Alaska provision is exceptional in extending the time to one year.

§ 9. Within thirty days after such location work has been completed, the owner of such claim or some person having personal knowledge of the facts, shall file in the office of the recorder for the precinct in which the claim is situate, a certificate which shall set forth a description of such location work and the place where the same has been performed with reference to the boundaries of such claim. Such certificate shall be sworn to before some officer authorized to administer oaths. For such verification and the execution of the certificate thereof the precinct recorder or other officer taking and executing the same shall charge a fee of not more than fifty cents and no other or additional fee shall be charged or collected for the filing, indexing and recording of such certificate.[10]

[10] Usually this statement is incorporated in the certificate of location, as in most states the location work must be completed before the certificate of location is recorded. Obviously, when the time of completion of the location work is extended to one year this cannot be done.

§ 10. Within ninety days after discovery, the locator shall record with the recorder of the precinct wherein the claim is situate, a certificate of location. Such certificate shall contain:

(a) The name or number of the claim;

(b) The name of the locator or locators;

(c) The date of discovery and posting of the location notice;

(d) Number of feet claimed along the course of the vein each way, from the discovery or initial post, stake or monument, which is post, stake or monument number one, with the number of feet in width claimed on each side of the center of the vein.

Such certificate shall set forth a description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; and a description of the boundaries, corner monuments, and markings thereon.[11]

[11] For a discussion of the nature of the location certificate, its contents and the recording of the certificate, see §§ 379–392 of the text.

§ 11. If the discoverer of any vein, lode or ledge or rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposit, shall fail to comply with any of the provisions of sections seven, eight, nine and ten within the time therefor specified, all right to appropriate any portion of the public domain, acquired by him by reason of his discovery, shall cease.[12]

[12] This is evidently a statutory declaration that all rights shall be forfeited upon a failure to comply with the provisions noted. The language is not as specific in this respect as it might have been, but the conclusion is unavoidable. On the general subject of forfeiture, see §§ 274, 384, 390 and 645 of the text.

§ 12. The term "lode" as used in this act shall be construed to mean ledge, vein or deposit.[13]

[13] That these terms are legal equivalents, see § 290 of the text.

**Location of placer claim.**

§ 12¼. That no association placer mining claim shall hereafter be located in Alaska in excess of forty acres.[14]

[14] This is merely a re-enactment of a similar provision contained in the congressional act of August, 1912. See Appendix, *ante*. See text, §§ 448, 450.

§ 12½. No person shall locate placer mining claims for more than two individuals under power or powers of attorney, executed as provided in section one of this act, and no agent or attorney shall be permitted to locate more than two placer mining claims for any one person during any calendar month.[15]

[15] Similar provisions are contained in the federal act referred to in the note to the last paragraph.

§ 12¾. That no person shall hereafter locate or cause to be located for himself more than two placer mining claims in any calendar month.[16]

[16] Same provision contained in the federal act.

§ 13. Any person who discovers upon the public domain of the United States, within the territory of Alaska a placer deposit of gold, or other deposit of mineral having a commercial value, which is subject to entry and patent under the mining law of the United States, may, if qualified by the laws of the United States, locate a mining claim upon such deposit in the following manner.[17]

[17] The subject of what constitutes a discovery of a placer deposit is discussed in § 437 of the text. As to the qualifications of a locator, see §§ 223–227 of the text.

§ 14. He must at the time of discovery post conspicuously at the point of discovery, a notice of location thereof, containing (a) the name or number of the claim; (b) the name of the locator or locators;

(c) the date of discovery and posting of notice as in this section provided for; (d) the number of feet in length and width claimed; the notice herein described shall be known as the location notice.[18]

[18] See § 442 of the text.

§ 15. At the time of posting the notice of location, he shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes or posts not less than three feet high above the ground and three inches in diameter and hewed on the side or sides facing the claim or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high. Whatever monument is used it must be marked with the name or number of the claim and the designation of the corner by number, and the monument nearest the discovery shall be the initial post, stake, or monument, and shall be post, stake, or monument number one; and further the corners shall be numbered in regular rotation. If the claim is located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees be marked or blazed along the lines of such claim to indicate the location of such lines. If located in an open country the boundary lines shall be marked by placing line stakes or line monuments so as to readily lead from corner to corner of such claim.[19]

[19] See §§ 454–455 of the text.

§ 16. Within ninety days from the date of discovery, and prior to the filing of the certificate of location as provided in the following section, the locator or locators shall perform labor upon such claim in developing the same, to an amount which shall be equivalent in the aggregate to one hundred dollars' worth of such work for each twenty acres or fractional part thereof, contained in such claim, and such work shall be known and shall constitute "location work."[20]

[20] See § 443 of the text. The federal statute of August 1, 1912, provides that this amount of work shall be performed during the year of location and this provision of the Alaska legislature shortens this time to ninety days.

§ 16½. Nothing in this act shall be held to apply to lands located under the laws of the United States as placer claims for the purpose of the development of petroleum and natural gas and other natural oil products.[21]

[21] This section apparently leaves the location of oil claims to be governed solely by the federal requirements.

§ 17. Within ninety days after the discovery the locator shall record with the recorder of the precinct wherein such claim is situate, a certificate of location. Such certificate shall contain:

(a) The name or number of the claim:

(b) The name of the locator or locators;

(c) The date of discovery and posting of the location notice;

(d) Number of feet in length and width claimed.

Such certificate shall also set forth a description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; a description of the boundaries, corner monuments and markings thereon, and a description of the location work and the place where the same has been performed. Such certificate of location shall not be accepted for record by the precinct recorder unless the same be verified, before the recorder of the precinct or some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one or by the authorized agent, having personal knowledge of the facts required to be stated therein. For such verification and the execution of the certificate thereof the precinct recorder or other officer taking and executing the same shall charge a fee of not more than fifty cents. A certificate of location so verified, or a certified copy thereof, shall be *prima facie* evidence of all the facts properly recited therein.[22]

[22] See § 459 of the text. On the subject of verification of location notices, see § 385.

§ 18. If the discoverer of any placer deposit fails to comply with any of the provisions of sections fourteen, fifteen, sixteen and seventeen, with the time thereof specified, all right to appropriate any portion of the public domain, acquired by him by reason of his discovery, shall cease; and any placer mining claim attempted to be located in violation of sections twelve and one-quarter, twelve and one-half, and twelve and three-quarters, or any of them, shall be null and void and the area thereof may be located by any qualified locator as if no such previous attempt had ever been made.[23]

[23] On the general subject of forfeiture, see §§ 274, 384, 390 and 645 of the text.

§ 19. All acts and parts of acts in conflict herewith are hereby repealed to the extent of such conflicts.

### B. Reference to Miscellaneous Territorial Legislation.

1. An act for the protection of *bona fide* purchasers of ore from mining claims, title to which is in dispute, and providing for notice to intending purchasers of such ores. Sess. Laws 1913, ch. 8, p. 9.

2. An act providing an eight-hour law for underground miners, and laborers in mill and reduction works. Sess. Laws 1913, ch. 29, p. 35.

3. An act providing for mine inspectors, and for the health and safety of mine workers. Sess. Laws 1913, ch. 72, p. 274.

4. An act providing for the filing of grubstake contracts and prospecting agreements. Sess. Laws 1913, ch. 49, p. 103.

5. An act providing that the use of water for mining and power purposes shall be a public use and that rights of way for such purposes may be condemned. Sess. Laws 1913, ch. 55, p. 118.

6. An act providing for liens on mines in favor of laborers and materialmen. Sess. Laws 1913, ch. 79, p. 308.

7. An act fixing the liability of employers for personal injuries to their employees in mines and other occupations and abolishing the absolute defense of contributory negligence. Sess. Laws 1913, ch. 45, p. 84.

8. An act making the stealing of ore or concentrates a felony. Sess. Laws 1913, ch. 30, p. 37.

## ARIZONA.

I. Act of 1901 Relating to the Location, Development, and Forfeiture of Mining Claims.

II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. ACT OF 1901, AS AMENDED, RELATING TO THE LOCATION, DEVELOPMENT AND FORFEITURE OF MINING CLAIMS.

(A complete Code of Mining Laws of Arizona is being prepared by a commission created by an act of the legislature of 1909—Laws 1909, ch. 36, page 112.)

**Discoverer of lode may locate claim for himself or others.**

§ 1. On the discovery of mineral in place on the public domain of the United States, the same may be located as a mining claim by the discoverer for himself, or for himself and others, or for others. Rev. Stats. of 1901, § 3231.

**Manner of making location, and contents of notice.**

§ 2. Such location shall be made by erecting at or contiguous to the point of discovery a conspicuous monument of stones not less than three feet in height, or an upright post, securely fixed, projecting at least four feet above the ground, in which monument of stones or on which post there shall be posted a location notice, which shall be signed by the name or names of the locator or locators. The location notice must contain:—

1. The name of the claim located;

2. The name or names of the locators;

3. The date of the location;

4. The length and width of the claim in feet, and the distance in feet from the point of discovery to each end of the claim; [1]

5. The general course of the claim;

6. The locality of the claim with reference to some natural object, or permanent monument whereby the claim can be identified.[2] Rev. Stats. of 1901, § 3232.

[1] Surface area, length and width of lode claims: § 361.

[2] Variation between calls in certificate and monuments on the ground: § 382.

"Natural objects" and "permanent monuments": § 383.

Section referred to in text: §§ 353, 380.

Liberal rules of construction applied to notices: § 355.

Place and manner of posting: § 356.

Purpose of location certificate: § 379.

Rules of construction applied to location certificates: § 381.

Effect of failure to comply with law as to contents of certificate: § 384.

**When right to claim acquired.**

§ 3. Until each and all of the above-specified things shall have been done, no right thereto shall have been acquired. Rev. Stats. of 1901, § 3233.

**Time and manner of completing location.**

§ 4. From the time of the location of a mining claim, as above specified, the locator shall be allowed ninety days within which to do or cause to be done the following things:—

1. To cause to be recorded in the office of the county recorder of the county in which the claim is situated a copy of the location notice;[1]

2. To sink a discovery shaft in the claim to a depth of at least eight feet from the lowest part of the rim of the shaft at the surface, and deeper, if necessary, until there is disclosed in said shaft mineral in place;[2]

3. To monument the claim on the ground so that its boundaries can be readily traced. Rev. Stats. of 1901, § 3232; Amd. 1909, p. 157.

Section referred to in text: § 374.
Marking boundaries: §§ 371–375.

[1] Prior to the passage of the act of July 1, 1895, there was no penalty attached to a failure to record the location notice. Jordan v. Duke (Ariz.), 53 Pac. 197.
The record: §§ 389–392.

[2] Subject discussed in text: §§ 343–346.

**Failure to complete location is abandonment of claim.**

§ 5. The failure to do all the things enumerated in this section in the time and place specified shall be construed into an abandonment of the claim, and all right and claim thereto of the discoverer and locator shall be forfeited. Rev. Stats. of 1901, § 3235.

**Marking of surface boundaries.**

§ 6. Such surface boundaries shall be marked by six substantial posts projecting at least four feet above the surface of the ground, or by substantial stone monuments at least three feet high, to wit: One at each corner of said claim and one at the center of each end-line thereof. Rev. Stats. of 1901, § 3235.

Marking boundaries: §§ 371–375.

**Equivalent of discovery shaft.**

§ 7. Any open cut, adit, or tunnel, which shall be made as above provided for, as a part of the location of a lode mining claim, and which shall be equal in amount of work to a shaft eight feet deep and four feet wide by six feet long, and which shall cut a lode or mineral

in place at a depth of eight feet from the surface, shall be equivalent, as a discovery work to a shaft sunk from the surface. Rev. Stats. of 1901, § 3237; Amd. 1909, p. 157.

Subject of discovery shaft and equivalent discussed: §§ 343–346.

**Amended location notices.**

§ 8. Location notices may be amended at any time and the monuments changed to correspond with the amended location; provided, that no change shall be made that will interfere with the rights of others. Rev. Stats. of 1901, § 3238.

Objects and functions of amended certificates: § 398.

**Annual work governed by laws of United States.**

§ 9. The amount of assessment or representation work or improvements to be done or made during each year, after the completion of the location as heretofore provided, and the time for doing the same, shall be as provided by the laws of the United States. Rev. Stats. of 1901, § 3239.

Federal law concerning annual labor. Rev. Stats., § 2324. See *ante*, p. 1651.

Section referred to in text: § 626.

Perpetuation of estate by annual development and improvement: §§ 623–638.

**Annual labor—Affidavit of performance.**

§ 10. Within three months after the expiration of the period of time fixed for the performance of annual labor or the making of improvements upon any mining claim, the person on whose behalf such work or improvement was made, or some person for him knowing the facts, may make and record in the office of the county recorder of the county wherein such claim is situated, an affidavit, in substance as follows:—

Territory of Arizona,
County of ———, —ss.

———, ———, being duly sworn, deposes and says that he is a citizen of the United States and more than twenty-one years of age, resides at ———, in ——— county, Arizona territory, and is personally acquainted with the mining claim known as ——— mining claim, situated in ——— mining district, Arizona territory, the location notice of which is recorded in the office of the county recorder of said county, in book —— of records of mines, at page ——; that between the —— of ————, A. D. —— and the —— day of ————, A. D. ——, at least ——— dollars' worth of work and improvements were done and performed upon said claim, not including the location work of said claim. Such work and improvements were made by and at the expense of ———, owners of said claim, for the purpose of complying with the laws of the United States pertaining to assessments

of annual work, and [here name the miners or men who worked upon the claim in doing the work] were the men employed by said owner and who labored upon said claim, did said work and improvements, the same being as follows, to wit: [Here describe the work done.]

[Signature] ——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. ——.

My commission as notary public expires on the —— day of ———, A. D. ——.

[Notarial seal.] ——— ———.

Notary Public.

Rev. Stats. 1901, § 3240.

Section referred to in text: § 636.

**Affidavit of performance of annual labor as evidence—Relocation of abandoned claims.**

§ 11. Such affidavit, when so recorded, shall be *prima facie* evidence of the performance of such labor or improvements, and said original affidavit after it has been recorded, or a certified copy thereof, or the record thereof, shall be received as evidence accordingly by the courts of this territory. The location of an abandoned or forfeited claim shall be made in accordance with the provisions of paragraph 3232 (§ 2) of title 47, chapter xlvii of the Revised Statutes of Arizona, 1901, except that the relocator may, if he so elect, perform his location work by sinking the original location shaft ten feet deeper than it was originally, or in case the original location work consisted of a tunnel or open cut, he may perform his location work by extending said tunnel or open cut by removing therefrom 240 cubic feet of rock or vein material. Rev. Stats. 1901, § 3241; Amd. 1907, p. 27.

Subject discussed: § 636.

**Placer claims—Manner of locating.**

§ 12. The locator of a placer mining claim shall locate his claim in the following manner: By posting a location notice thereon containing the name of the claim, the name of the locator or locators, the date of location, and the number of acres claimed, a description of the claim with reference to some natural object or permanent monument that will identify the claim by marking the boundaries of his claim with a post or monument of stones at each angle of the claim located. When a post is used, it must be at least four inches by four feet six inches in length, set one foot in the ground, and surrounded by a mound of stone or earth. Rev. Stats. 1901, § 3242.

Section referred to in text: §§ 442, 445.
Placer location and its requirements: §§ 432, 433.
Location certificate and its record: § 459.
Marking boundaries: §§ 454, 455.

**Placer claims—Manner of marking boundaries.**

§ 13. Where it is practically impossible, on account of a bed of rock or precipitous ground, to sink such posts, they may be placed in a pile of stones. And if for any reason it is impossible to erect and maintain a post or monument of stone at any angle of such claim, a witness-post or monument may be used, said witness monument to be placed as near the true corner as the nature of the ground will permit. When a mound of stone is used, it must be at least three feet in height and four feet in diameter at the base. Rev. Stats. 1901, § 3243.

See text, §§ 454, 455.

**Placer location notice—Recording.**

§ 14. The locator of any placer claim shall within sixty days after the date of location of such claim have a copy of the location notice claim recorded in the office of the county recorder of the county in which said placer claim may be situated. Any record of the location of a placer mining claim which shall not contain all the requirements of this section shall be void. Rev. Stats. 1901, § 3244.

Location certificate and its record: § 459.

**Forfeiture to co-owners, how effected.**

§ 15. Whenever a co-owner or co-owners shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section twenty-three hundred and twenty-four (2324) of the Revised Statutes of the United States an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder of the county in which the mining claim is situate, within ninety (90) days after giving the notice, or, if such notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice an affidavit of the editor, publisher or foreman of such paper stating the date of the first, last, and each insertion of such notice therein, and when and where the newspaper was published during that time, and the name of such newspaper. Such affidavit and notice shall be recorded as aforesaid within one hundred and eighty days after the first publication thereof. Rev. Stats. 1901, § 3245.

Validity of this class of laws questioned: §§ 251, 646.
Forfeiture to co-owners under federal law discussed: § 646.
For departmental regulations on this subject, see *ante*, p. 2288, par. 15.

**Failure of co-owner to contribute, how proved.**

§ 16. The original of such notice and affidavits of the records thereof shall be evidence that the delinquent mentioned in section 2324 has failed or refused to contribute his proportion of the expend-

iture required by that section, and of the services or publication of said notice; provided, the writing or affidavit hereinafter provided for is not of record. Rev. Stats. 1901, § 3246.

See note to preceding section.

**Certificate of contribution by co-owner within ninety days after notice.**

§ 17. If such delinquent shall, within the ninety days required by section 2324 aforesaid, contribute to his co-owner or co-owners his proportion of such expenditures, such co-owner or co-owners shall sign and deliver to the delinquent or delinquents a writing, stating that the delinquent or delinquents by name, has within the time required by section 2324 of the Revised Statutes of the United States, contributed his share for the year ——— upon the ——— mine, and further stating therein the districts, county, and territory wherein the same is situate, and the book and page where the location notice is recorded. Such writing shall be recorded in the office of the county recorder of said county. Rev. Stats. 1901, § 3247.

See note to § 3245.

**Penalty for failure to deliver certificate of contribution.**

§ 18. If such co-owner or co-owners shall fail to sign and deliver such writing to the delinquent or delinquents within twenty days after such contribution, the co-owner or co-owners so failing as aforesaid, shall be liable to a penalty of one hundred dollars, to be recovered by any person for the use of the delinquent or delinquents, in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within said twenty days, then the delinquent, with two disinterested persons having personal knowledge of such contribution, may make an affidavit, setting forth in what manner, the amount of, to whom, and upon what mine, such contribution was made. Such affidavit or a record thereof in the office of the county recorder of the county in which said mine is situate, shall be *prima facie* evidence of such contribution. Rev. Stats. 1901, § 3248.

See note to § 3245, *supra*.

**Description of mining claims, what is sufficient.**

§ 19. In all actions, judgments, grants, or conveyances it shall be a sufficient description of a mining claim, if it can be intelligently learned therefrom the name of the claim, the district, county, and territory where same is situate, and the book and page where the notice thereof is recorded. Rev. Stats. 1901, § 3249.

**Recorders to procure books for mining records.**

§ 20. The county recorders of the several counties are authorized and required to procure suitable books in which the records of all

mines and mineral deposits shall be kept, which said books shall be paid for out of the county treasury. Rev. Stats. 1901, § 3250.

**Previous locations not affected.**

§ 21. Nothing in this act shall be so construed as to affect the claims to mines and mineral deposits heretofore located and duly recorded. Rev. Stats. 1901, § 3251.

§ 22. No relocation of an abandoned mining claim, made prior to the 12th day of March, 1907, shall be held invalid upon the ground that the notice of relocation did not state that said claim was in part or in whole an abandoned mining claim. Laws 1909, p. 265.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that destruction of notices of location shall be punished as a misdemeanor. Rev. Stats. 1887, p. 746, par. 947; Rev. Stats. 1901, p. 1282; Penal Code, § 548.

2. Concerning drainage of mines. Rev. Stats. 1887, p. 412, par. 2352; Rev. Stats. 1901, p. 841; Civil Code, §§ 3252–3257.

3. Providing for condemnation of rights of way for roads, ditches, tunnels, flumes and other easements for mining purposes. Rev. Stats. 1887, p. 314; Rev. Stats. 1901, p. 654; Civil Code, § 2445, subd. 5.

4. Providing for miners' liens. Rev. Stats. 1887, p. 402, par. 2276; Rev. Stats. 1901, p. 762; Civil Code, § 2904, amended on referendum Session Laws 1913 (Special), p. 7.

5. Providing a penalty for "salting" ores. Laws of 1895, p. 34; Rev. Stats. 1901, p. 1272; Penal Code, § 494.

6. Relating to sales of mining property when belonging to estates. Rev. Stats. 1901, p. 513; Civil Code, §§ 1772–1776.

7. Relating to optional sales of mining property belonging to estates of decedents or infants or insane persons. Laws 1897, p. 111; Rev. Stats. 1901, p. 560; Civil Code, §§ 2013–2017.

8. Restricting charges for assaying ores and for recording notices of location of mining claims. Laws 1899, p. 21; Rev. Stats. 1901, p. 843; Civil Code, §§ 3258, 3259; Laws 1909, p. 214.

9. Providing that an injunction issuing against the working and mining of a lode or mining claim without notice to the opposite party shall be void. Rev. Stats. 1901, p. 730; Civil Code, § 2746.

10. Making public waters applicable for the purposes of irrigation and mining. Rev. Stats. 1901, p. 1045; Civil Code, § 4174.

11. Reserving the right of inhabitants to erect dams, mills, machinery, sluices, or dykes for mining purposes or the reduction of metals, even if irrigation of land is thereby interfered with, by paying the

land owner damages therefor. Rev. Stats. 1901, pp. 1045, 1046; Civil Code, §§ 4178–4180.

12. Providing a penalty for the falsifying by any person engaged in milling, smelting, sampling, concentrating, reducing, shipping, or purchasing ores of the value of any ores delivered to him. Rev. Stats. 1901, p. 1269; Penal Code, § 484.

13. Providing a penalty for taking water from a canal, ditch, flume, or reservoir, used for mining purposes. Rev. Stats., p. 1271; Penal Code, § 493.

14. Enacting an eight-hour day law for underground miners. Laws 1903, p. 12.

15. Providing for the taxation of mines and mining claims and the ores or mineral products of the same. Laws 1907, p. 20.

16. Establishing a uniform code of mine bell signals and hoisting rules. Laws 1907, p. 118.

17. Establishing an eight-hour day for hoisting engineers and furnace men. Laws 1909, p. 40.

18. Creating a commission to prepare and draft a comprehensive code of mining laws and to provide for effective mine inspection. Laws 1909, p. 112.

19. Providing for assays to be made when requested at the University of Arizona. Laws 1909, p. 214.

20. Confirming the right of aliens to own and work mines and mining land. Laws 1912, p. 350.

21. Providing for a mine inspector and for safety regulations governing the operation of mines. Laws 1912, p. 87.

22. Providing for miners' liens. Laws 1912, p. 296.

23. Providing for elementary instruction in mining in high schools. Laws of 1912, p. 197.

24. Providing for eight-hour shifts for miners. Laws 1912 (Ex. Sess.), p. 85.

## ARKANSAS.

I. Record of Location Notices—Limitations—Annual Labor.
II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. RECORD OF LOCATION NOTICES—LIMITATIONS—ANNUAL LABOR.

**Recording mining claim notices.**

§ 1. In every county in this state in which lands containing minerals still belong to the United States government, the recording of mining claim notices of all kinds may be done with the *ex-officio* recorders of the various counties in which said lands are situated. Acts of 1899, p. 113; Amd. Digest of Statutes 1904, § 5360.

Recording location certificates: Lode claims: §§ 389–392; Placers: § 459.

Section 2 provides for recorder's fee.

**Recorder to provide book and keep a plat for mining records.**

§ 3. The recorder shall procure a suitably bound book, and shall make a plat therein of each mining claim located for the free use of all miners who may wish to examine the same. Acts of 1899, p. 113; Amd. Digest of Statutes of 1904, § 5362.

Recorder to record notices, etc., and keep a plat of locations. Digest of Statutes of 1904, § 5365.

**Possessory right to mining claim—Annual work—Statute of limitations.**

§ 4. Where any owner or claimant of any mining claim on any of the lands subject to location as mining claims in this state under the laws of the United States, shall have had possession of such claim for a period of three (3) years and shall have performed the necessary amount of annual labor or improvement to hold said claim, as now required by law for said period, the same shall be sufficient to establish his possessory right to the same; provided, that if said claimant shall have performed the necessary work for any one (1) year during such period and shall have resumed work at any time before the right of others intervene, then he shall be entitled to the possessory right to the same. No person shall maintain an action against such claimant for the recovery of a mining claim, unless the same shall be commenced within one (1) year after his right of action shall accrue. Acts of 1901, p. 330; Digest of Statutes 1904, § 5363.

Perpetuation of estate by annual development and improvement: §§ 623–638.

**Affidavit of performance of annual work—Recording.**

§ 5. On or before the thirty-first day of December of any year in which the time expires in which the assessment work or improvement now required by law to hold the same, the owner of such claim, or, in his absence, his agent or the party who was in charge of the work for the claimant, may make and file for record in the recorder's office in the county in which said claim is situated, an affidavit in substance as follows:—

State of Arkansas,
County of ———, —ss.

——— ———, being duly sworn, deposes and says that at least ——— dollars' worth of work or improvements were performed or made upon [here describe claim] situated in ——— mining district, county of ——— and state of Arkansas, between the —— day of ——— and the —— day of ———, A. D. ——, and that such expenditure was made by or at the expense of ———, owners of said claim, for the purpose of complying with the law for holding said claim.

[Signature] ——— ———.
[Jurat] ——— ———.

And said affidavit when so filed and recorded shall be *prima facie* evidence of the performance of such labor or the making of such improvements. Acts of 1901, p. 330; Digest of Statutes 1904, § 5364.

Proof of annual work: § 636.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that general assembly may create mining, manufacturing, and agricultural bureau; the office of state geologist; and exempt capital invested in any or all kinds of mining or manufacturing business from taxation for a period of seven years. Const., art. x.

2. Establishing bureau of mines, manufacturing, and agriculture, and defining duties of the commissioner thereof. Sand. & H. Digest of Stats. (1894), §§ 5063–5072; Digest of Stats. 1904, §§ 5367–5376.

3. Providing for miner's lien. Acts of 1895, p. 27; Digest of Stats. 1904, § 5359.

4. Establishing general police regulations in connection with the working of coal mines for the purpose of general security, and the health and safety of employees. Sand. & H. Digest of Stats. (1894), §§ 5045–5062; Acts of 1899, p. 165; Digest of Stats. 1904, §§ 5337–5358; Amended Acts of 1905, p. 567.

5. Fee for recording notice of location, one dollar. Digest of Stats. of 1904, § 5361.

6. Authorizing mining corporations in the state of Arkansas to construct and operate short connecting lines of railway and granting them the right of eminent domain for this purpose. Acts of 1905, p. 407.

7. Conferring the right of eminent domain upon gas and oil companies for pipe-line purposes. Acts of 1905, p. 577.

8. Requiring that abandoned shafts and wells be kept covered. Acts of 1905, p. 312.

9. Coal mine operators liable in damages for death or injuries of employees resulting from negligence of fellow-employees. Laws 1907, p. 163.

10. Making it unlawful to drive pit or slope over, under, or across cemeteries. Acts of 1907, p. 138.

12. Providing for a survey of slate deposits in the state. Acts of 1909, p. 1020.

13. Authorizing the leasing of lands of minors for oil and gas purposes. Acts of 1913, p. 974.

## CALIFORNIA.

I. Act of 1909, Relating to Location and Tenure of Mining Claims.

II. Provisions on Subject of Recording.

III. Regulating the Sale of Mineral Lands Belonging to the State.

IV. Congressional Act Regulating Hydraulic Mining in California.

V. Reference to Miscellaneous Legislation on Mining Subjects.

In 1891 the legislature of this state passed an act providing for the proof of annual labor, forfeiture to co-owners, and resumption of work to prevent forfeiture. Subsequently, in 1897, another act more comprehensive in scope and embracing some of the subjects embodied in the previous law was passed. Stats. 1897, p. 215. This act repealed by implication the act of 1891, to the extent that it embraced subjects covered by the prior law. This last-named act was itself repealed by the act of March 20, 1899. Stats. 1899, p. 148.

Owing to the peculiar phraseology of the repealing act, it was contended that it was ineffectual and did not operate to repeal the act of 1897. This contention was set at rest by a decision of the supreme court of California,[1] holding it to be effectual, and that the act stood repealed March 20, 1899.

Before this decision was rendered, however, the legislature had passed a second repealing act the phraseology of which was free from objection, which took effect February 8, 1900. Stats. 1900, p. 9.

This left in force such of the provisions of the act of 1891 which were not in conflict with the act of 1897.

After the repeal of the act of 1897, with the exception of the unrepealed provisions of the act of 1891 and some isolated legislation on the subject of recording, which was of an equivocal character, so far as it affected the necessity for recording of mining locations, there was no legislation in California supplementary to the federal mining laws until the act of 1909 was passed. After the repeal of the act of 1897, in some parts of the state mining districts were reorganized and local regulations, limited in scope, were adopted. These instances were sporadic.

In 1909 the legislature passed an act providing for the manner of locating mining claims and other related subjects affecting the tenure of such claims. This act is but little more than an effort to express in statutory form the practice governing these matters which is common in the mining regions of the west. There are no radical changes in the customary law. No location or discovery work is required and locators, as a rule, through custom and habit, take the steps in per-

fecting locations as are provided for in this act. By implication this act repeals certain of the provisions of the act of 1891 which remained still unrepealed. The act of 1909 is herewith appended in full.

1 County of Kern v. Lee, 129 Cal. 361, 61 Pac. 1124.

## I. ACT OF MARCH 13, 1909.

Adding a new title to the Civil Code of the State of California.

[Stats. 1909, pp. 313–317.]

§ 1. The Civil Code of the state of California is hereby amended by adding a new title thereto, to be numbered title x, in part iv of second division, consisting of sections 1426, 1426*a*, 1426*b*, 1426*c*, 1426*d*, 1426*e*, 1426*f*, 1426*g*, 1426*h*, 1426*i*, 1426*j*, 1426*k*, 1426*l*, 1426*m*, 1426*n*, 1426*o*, 1426*p*, 1426*q*, and 1426*r*, to read as follows:

**Lode claims, how located.**

1426. Any person, a citizen of the United States, or who has declared his intention to become such, who discovers a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, may locate a claim upon such vein or lode, by defining the boundaries, of the claim, in the manner hereinafter described, and by posting a notice of such location, at the point of discovery, which notice must contain:

First—The name of the lode or claim.

Second—The name of the locator or locators.

Third—The number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be.

Fourth—The date of location.

Fifth—Such a description of the claim by reference to some natural object, or permanent monument, as will identify the claim located.

**Boundaries and extent of lode claim.**

1426*a*. The locator must define the boundaries of his claim so that they may be readily traced, and in no case shall the claim extend more than fifteen hundred feet along the course of the vein or lode, nor more than three hundred feet on either side thereof, measured from the center line of the vein at the surface.

Similar provisions are to be found in sections 2320 and 2324 of the U. S. Revised Statutes.

**Record of location of lode claim.**

1426*b*. Within thirty days after the posting of his notice of location upon a lode mining claim, the locator shall record a true copy thereof

in the office of the county recorder of the county in which such claim is situated, for which service the county recorder shall receive a fee of one dollar.

**Placer claim, location of.**

1426*c*. The location of a placer claim shall be made in the following manner: By posting thereon upon a tree, rock in place, stone, post or monument, a notice of location, containing the name of the claim, name of locator or locators, date of location, number of feet or acreage claimed, such a description of the claim by reference to some natural object or permanent monument as will identify the claim located, and by marking the boundaries so that they may be readily traced; *provided*, that where the United States survey has been extended over the land embraced in the location, the claim may be taken by legal subdivisions and no other reference than those of said survey shall be required and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivisions shall be deemed the equivalent of marking.

**Record of location of placer claim.**

1426*d*. Within thirty days after the posting of the notice of location of a placer claim, the locator shall record a true copy thereof in the office of the county recorder of the county in which such claim is situated, for which service the recorder shall receive a fee of one dollar.

**Tunnel right, location of.**

1426*e*. The locator of a tunnel right or location, shall locate his tunnel right or location by posting a notice of location at the face or point of commencement of the tunnel, which must contain:

First—The name of the locator or locators.

Second—The date of the location.

Third—The proposed course or direction of the tunnel.

Fourth—A description of the tunnel, with reference to some natural object or permanent monument as shall identify the claim or tunnel right.

**Boundaries of tunnel location.**

1426*f*. The boundary lines of the tunnel shall be established by stakes or monuments placed along the lines at an interval of not more than six hundred feet from the face or point of commencement of the tunnel to the terminus of three thousand feet therefrom.

**Record of tunnel location.**

1426*g*. Within thirty days after the posting the notice of location of the tunnel right or location, the locator shall record a true copy

thereof, in the office of the county recorder of the county in which such claim is situated, for which service the recorder shall receive a fee of one dollar.

**Amended notice of location.**

1426*h*. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original location notice was defective, erroneous, or that the requirements of the law had not been complied with before filing; or in case the original notice was made prior to the passage of this act, and he shall be desirous of securing the benefit of this act, such locator, or his assigns, may file an additional notice, subject to the provisions of this act; *provided*, that such amended location notice does not interfere with the existing rights of others at the time of posting and filing such amended location notice, and no such amended location notice or the record thereof, shall preclude the claimant, or claimants from proving any such title as he or they may have held under previous locations.

**Record of survey of mining claim prima facie evidence.**

1426*i*. Where a locator, or his assigns, has the boundaries and corners of his claim established by a United States deputy mineral survey, or a licensed surveyor of this state, and his claim connected with the corner of the public or minor surveys of an established initial point, and incorporates into the record of the claim, the field-notes of such survey, and attaches to and files with such location notice, a certificate of the surveyor, setting forth: First, that said survey was actually made by him, giving the date thereof; second, the name of the claim surveyed and the location thereof; third, that the description incorporated in the declaratory statement is sufficient to identify; such survey and certificate becomes a part of the record, and such record is *prima facie* evidence of the facts therein contained.

**Millsite, location of.**

1426*j*. The proprietor of a vein or lode claim or mine, or the owner of a quartz-mill or reduction works, or any person qualified by the laws of the United States, may locate not more than five acres of non-mineral land as a millsite. Such location shall be made in the same manner as hereinbefore required for locating placer claims.

**Record of location of millsite.**

1426*k*. The locator of a millsite claim or location shall, within thirty days from the date of his location, record a true copy of his location notice with the county recorder of the county in which such location is situated, for which service the recorder shall receive a fee of one dollar.

**Annual labor required.**

1426*l*. The amount of work done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, to wit: One hundred dollars annually.

See § 2324, U. S. Revised Statutes.

**Record of proof of annual labor.**

1426*m*. Whenever mine owner, company, or corporation shall have performed the labor and made the improvements required by law upon any mining claim, the person in whose behalf such labor was performed or improvements made, or someone in his behalf, shall within thirty days after the time limited for performing such labor or making such improvements make and have recorded by the county recorder, in books kept for that purpose, in the county in which such mining claim is situated, an affidavit setting forth the value of labor or improvements made, the name of the claim, and the name of the owner or claimant of said claim at whose expense the same was made or performed. Such affidavit, or a copy thereof, duly certified by the county recorder, shall be *prima facie* evidence of the performance of such labor or the making of such improvements, or both.

**Fee for recording proof of labor.**

1426*n*. For recording the affidavit herein required, the county recorder shall receive a fee of fifty cents.

**Forfeiture to co-owners—Contribution by delinquent co-owners.**

1426*o*. Whenever a co-owner or co-owners of a mining claim shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section 2324, Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder, in books kept for that purpose, in the county in which the claim is situated, within ninety days, after the giving of such notice; for the recording of which said recorder shall receive the same fees as are now allowed by law for recording deeds; or if such notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice an affidavit of the printer or his foreman, or principal clerk of such paper, stating the date of the first, last and each insertion of such notice therein, and where the newspaper was published during that time, and the name of such newspaper. Such affidavit and notice shall be recorded as aforesaid, within one hundred and eighty days after the first publication thereof. The original of such notice and affidavit, or a duly certified copy of the record thereof,

shall be *prima facie* evidence that the delinquent mentioned in section 2324 has failed or refused to contribute his proportion of the expenditure required by that section, and of the service of publication of said notice; *provided,* the writing or affidavit hereinafter provided for is not of record. If such delinquent shall, within the ninety days required by section 2324, aforesaid, contribute to his co-owner or co-owners, his proportion of such expenditures, and also all costs of service of the notice required by this section, whether incurred for publication charges, or otherwise, such co-owner or co-owners shall sign and deliver to the delinquent or delinquents a writing, stating that the delinquent or delinquents by name has within the time required by section 2324 aforesaid, contributed his share for the year ——, upon the —— mine, and further stating therein the district, county and state wherein the same is situated, and the book and page where the location notice is recorded, if said mine was located under the provisions of this act; such writing shall be recorded in the office of the county recorder of said county, for which he shall receive the same fees as are now allowed by law for recording deeds. If such co-owner or co-owners shall fail to sign and deliver such writing to the delinquent or delinquents within twenty days after such contribution, the co-owner or co-owners so failing as aforesaid shall be liable to the penalty of one hundred dollars to be recovered by any person for the use of the delinquent or delinquents in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within said twenty days, the delinquent, with two disinterested persons having personal knowledge of such contribution, may make affidavit setting forth in what manner, the amount of, to whom, and upon what mine, such contribution was made. Such affidavit, or a record thereof, in the office of the county recorder, of the county in which such mine is situated, shall be *prima facie* evidence of such contribution.

**Records to be received in evidence.**

1426*p*. The record of any location of a mining claim, millsite or tunnel right, in the office of the county recorder, as herein provided shall be received in evidence, and have the same force and effect in the courts of the state as the original notice.

**Copies of records as evidence.**

1426*q*. Copies of the records of all instruments required to be recorded by the provisions of this act, duly certified by the recorder, in whose custody such records are, may be read in evidence, under the same circumstances and rules as are now, or may be hereafter provided by law, for using copies of instruments relating to real estate, duly executed or acknowledged or proved and recorded.

**Effect of act on mining districts.**

1426*r*. The provisions of this act shall not in any manner be construed as affecting or abolishing any mining district or the rules and regulations thereof within the state of California.

**Failure to perform annual labor—Relocation void.**

1426*s*. The failure or neglect of any locator of a mining claim to perform development work of the character, in the manner and within the time required by the laws of the United States, shall disqualify such locators from relocating the ground embraced in the original location or mining claim or any part thereof under the mining laws, within three years after the date of his original location and any attempted relocation thereof by any of the original locators shall render such location void.

Sec. 2. All acts and parts of acts in conflict with this act, are hereby repealed.

Sec. 3. This act shall take effect and be in force on and after July 1, 1909.

## II. PROVISIONS ON SUBJECT OF RECORDING.

The County Government Act, approved April 1, 1897 (Stats. 1897, p. 484), in defining the duties of the county recorder, prescribes:—

§ 120. He must, upon the payment of his fees for the same, record, separately, in large and well-bound separate books, in a fair hand:—

[Among other instruments]:

12. Such other writings as are required or permitted by law to be recorded.

Section 1159 of the Civil Code as amended March 9, 1897, prescribes:

Judgments affecting the title to or possession of real property authenticated by the certificate of the clerk of the court in which such judgments were rendered (and notices of location of mining claims), may be recorded without acknowledgment, certificate of acknowledgment, or further proof. The record of all notices of location of mining claims heretofore made in the proper office without acknowledgment, or certificate of acknowledgment, or other proof shall have the same force and effect for all purposes as if the same had been duly acknowledged, or proved and certified as required by law. Affidavits showing work or posting of notices upon mining claims may also be recorded in the recorder's office of the county where such mining claims are situated.

The supreme court of California has held that under these statutes the fees collected by the recorder for recording notices of location of mining claims are to be paid by him into the county treasury, but declined to pass upon the validity or invalidity of the records as evidence. County of Kern v. Lee, 129 Cal. 361, 363, 61 Pac. 1124.

On the subject of recording consult § 392.

The subject of recording has been covered by the provisions of the act of 1909.

## III. REGULATING SALE OF MINERAL LANDS BELONGING TO THE STATE.

A law was passed in 1874 providing for the disposal of sixteenth and thirty-sixth sections belonging to the state which were found to be mineral in character. Stats. 1873–74, p. 766; Amended Stats. 1875–76, p. 20; Amended Stats. 1880, p. 26.

This act and those amendatory thereof were repealed by the act of April 1, 1897 (Stats. 1897, p. 438). The repealing act contained the following provisions:—

§ 2. When it shall be shown by affidavits or otherwise, to the satisfaction of the surveyor-general, that any portion of a sixteenth or thirty-sixth section belonging to the state is valuable for its mineral deposits, the surveyor-general shall not approve any application to purchase the same, nor shall the register of the state land office issue a certificate of purchase therefor until the question of the character of the land has been referred, for determination, to a court of competent jurisdiction, in the manner provided by section thirty-four hundred and fourteen of the Political Code, and adjudged not to be valuable as mining land.

§ 3. The sixteenth and thirty-sixth sections belonging to the state, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States, for the sale of mineral lands.

§ 4. This act shall take effect from and after its passage.

The peculiarity of these provisions deserves notice. Formerly mineral lands within 16th and 36th sections were sold by the state under special laws, which are repealed by this act. Title of the state to these sections vests upon approval of the survey if at that date the lands were not known to be mineral (*ante*, § 142). If they were then known to be mineral, the state received no title. The act, therefore, can have no possible application to any lands except 16th or 36th sections wherein mineral has been discovered subsequent to the approval of the survey and vesting of title in the state. What is the object of the act? The title gives no clue. It does not purport to revest title in the federal government. If it did it would not be effectual for any such purpose without the consent of congress. States have no power to compel the United States to resume sovereignty over such lands nor impose upon the national government the obligation to include such lands within its public land system without some concurrent congressional legislation, accepting the burden. In re State of Montana, 27 L. D. 474. If the intent of the act is to provide a method of location upon the theory of the retention of the title by the state, it is open to several constitutional objections. No act of a state legislature which should declare that the law of another state, without re-enacting it, should be the rule of civil conduct on a certain subject, could be upheld. We see no difference in principle when a federal statute is

named. Nevada has a similar law (see *post*, Nevada), which is open to the same objection.

Consult Stanley v. Mineral Union, 63 Pac. 59.

A statute of somewhat similar purport was passed also by the legislature of Alabama regulating the disposal of grants made by congress to the state in aid of railroad construction. See Miller's Executors v. Swann, 150 U. S. 132.

The secretary of the interior, referring to this act, says: "This would seem to be a waiver of claim on the part of the state to such of the sections 16 and 36 in place as were shown to be mineral in character after their identification, presumably with the intention of encouraging the exploration and development of mineral lands and indemnifying itself for any loss on account thereof through selection under the act of 1891." State of California, 33 L. D. 356.

The supreme court of California, in an opinion involving the taxability of a mining right, says *arguendo* of this statute: "It is a matter of common knowledge and a thing recognized by legislative enactments, that such mining rights and privileges may exist on lands belonging to the state of California."

(Citing this statute.)

Graciosa Oil Co. v. County of Santa Barbara, California.

## IV. CONGRESSIONAL ACT REGULATING HYDRAULIC MINING IN CALIFORNIA.

[27 Stats. at Large, 507; Supplement to Rev. Stats., vol. 2, p. 97. § 13 of this act was amended Feb. 27, 1907, 34 Stats. at Large, 1001.]

Causes leading up to the passage by congress of the act creating the debris commission: § 848.

Hydraulic mining not a nuisance *per se*—Principles established by the debris cases: § 849.

Essential features of the congressional act creating California debris commission and regulating hydraulic mining in the state of California: § 850.

Necessity for definition of term "hydraulic mining": § 851.

What constitutes "hydraulic mining" or "mining by the hydraulic process" within the meaning of the act: § 852.

Judicial interpretation of the act—Its constitutionality; § 853.

**California debris commission, how composed.**

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that a commission is hereby created, to be known as the California debris commission, consisting of three members. The president of the United States shall, by and with the advice and consent of the senate, appoint the commission from officers of the corps of engineers, United States army. Vacancies occurring therein shall be filled in like manner. It shall have the authority, and exercise the powers hereinafter set forth under the supervision of the chief of engineers and direction of the secretary of war.

**Organization of commission—Compensation—Adoption of rules.**

§ 2. That said commission shall organize within thirty days after its appointment by the selection of such officers as may be required in the performance of its duties, the same to be selected from the members thereof. The members of said commission shall receive no greater compensation than is now allowed by law to each, respectively, as an officer of said corps of engineers. It shall also adopt rules and regulations, not inconsistent with law, to govern its deliberations and prescribe the method of procedure under the provisions of this act.

**Territorial jurisdiction of commission—Hydraulic mining not provided for in this act prohibited.**

§ 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the state of California. Hydraulic mining, as defined in section eight hereof, directly or indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of this act is hereby prohibited and declared unlawful.

**Duty of commission to adopt plans to restore navigability of rivers, and permit hydraulic mining under proper restrictions.**

§ 4. That it shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys already made and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto.

**Duty of commission to investigate practicability of storage sites and of settling reservoirs.**

§ 5. That it shall further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for

the storage of debris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood time and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.

**Duty to note the effect on streams of such mining as the commission may permit.**

§ 6. That the said commission shall from time to time note the conditions of the navigable channels of said river systems, by cross-section surveys or otherwise, in order to ascertain the effect therein of such hydraulic mining operations as may be permitted by its orders and such as is caused by erosion, natural or otherwise.

**Annual report of commission.**

§ 7. That said commission shall submit to the chief of engineers, for the information of the secretary of war, on or before the fifteenth day of November of each year, a report of its labors and transactions, with plans for the construction, completion, and preservation of the public works outlined in this act, together with estimates of the cost thereof, stating what amounts can be profitably expended thereon each year. The secretary of war shall thereupon submit same to congress on or before the meeting thereof.

**"Hydraulic mining" defined.**

§ 8. That for the purposes of this act "hydraulic mining" and "mining by the hydraulic process," are hereby declared to have the meaning and application given to said terms in said state.

What constitutes "hydraulic mining" or "mining by the hydraulic process": §§ 851, 852.

**Permit to mine, how obtained—Petition.**

§ 9. That the individual proprietor or proprietors, or in case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the state of California, mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth

such facts as will comply with law and the rules prescribed by said commission.

**Right to regulate the restraining of the debris to be surrendered by petitioner.**

§ 10. That said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said state, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said state; provided, that they shall not interfere with the navigability of the aforesaid rivers.

**Joint petition by adjoining owners.**

§ 11. That the owners of several mining claims situated so as to require a common dumping-ground, or dam, or other restraining works for the debris issuing therefrom in one or more sites, may file a joint petition setting forth such facts in addition to the requirements of section nine hereof; and where the owner of a hydraulic mine or owners of several such mines have and use common dumping-sites for impounding debris or as settling reservoirs, which sites are located below the mine of an applicant not entitled to use same, such fact shall also be stated in said petition. Thereupon the same proceedings shall be had as provided for herein.

**Notice of petition to be published—Examination of mine—Plans may be filed—Further hearings.**

§ 12. A notice specifying briefly the contents of said petition, and fixing a time previous to which all proofs are to be submitted, shall be published by said commission in some newspaper or newspapers of general circulation in the communities interested in the matter set forth therein. If published in a daily paper such publication shall continue for at least ten days; if in a weekly paper in at least three issues of the same. Pending publication thereof said commission, or a committee thereof, shall examine the mine and premises described in such petition. On or before the time so fixed all parties interested, either as petitioners or contestants, whether miners or agriculturalists, may file affidavits, plans, and maps in support of their respective claims. Further hearings, upon notice to all parties of record, may be granted by the commission when necessary.

**Decision of commission—Order directing manner of construction of dam and condition under which operations may be carried on.**

§ 13. That in case a majority of the members of said commission, within thirty days after the time so fixed, concur in a decision in favor of the petitioner or petitioners, the said commission shall thereupon make an order directing the methods and specifying in detail the manner in which operations shall proceed in such mine or mines; what restraining or impounding works, if any, if facilities therefor can be found, shall be built and maintained; how and of what material; where to be located; and in general set forth such further requirements and safeguards as will protect the public interest and prevent injury to the said navigable rivers and the lands adjacent thereto, with such further conditions and limitations as will observe all the provisions of this act in relation to the working thereof and the payment of taxes on the gross proceeds of the same; *provided*, that all expense incurred in complying with said order shall be borne by the owner or owners of such mine or mines: *And provided further*, that where it shall appear to said commission that hydraulic mining can be carried on without injury to the navigation of said navigable rivers and the lands adjacent thereto, an order may be made authorizing such mining to be carried on without requiring the construction of any restraining or impounding works or any settling reservoirs; *and provided also*, that where such an order is made a license to mine, no taxes provided for herein on the gross proceeds of such mining operations shall be collected. [As amended Feb. 27, 1907, 34 Stats. at Large, 1001.]

**Submission of plans for correction—Construction of works.**

§ 14. That such petitioner or petitioners must within a reasonable time present plans and specifications of all works required to be built in pursuance of said order for examination, correction, and approval by said commission; and thereupon work may immediately commence thereon under the supervision of said commission or representative thereof attached thereto from said corps of engineers, who shall inspect same from time to time. Upon completion thereof, if found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act.

**When mine owner may commence mining.**

§ 15. That no permission granted to a mine owner or owners under this act shall take effect so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission, have been completed,

and until the impounding dams or other restraining works or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same; provided, however, that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations.

**Joint construction and use by adjoining owners—Expense, how divided—Where dams must be constructed.**

§ 16. That in case the joint petition referred to in section eleven hereof is granted, the commission shall fix the respective amounts to be paid by each owner of such mines toward providing and building necessary impounding dams or other restraining works. In the event of a petition being filed after the entry of such order, or in case the impounding dam or dams or other restraining works have already been constructed and accepted by said commission, the commission shall fix such amount as may be reasonable for the privilege of dumping therein, which amount shall be divided between the original owners of such impounding dams or other restraining works in proportion to the amount respectively paid by each party owning same. The expense of maintaining and protecting such joint dam or works shall be divided among mine owners using the same, in such proportion as the commission shall determine. In all cases where it is practicable, restraining and impounding works are to be provided, constructed, and maintained by mine owners near or below the mine or mines before reaching the main tributaries of said navigable waters.

**No mining to be allowed where debris cannot be impounded.**

§ 17. That at no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers, and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected.

**Commission may revoke or modify the order allowing owner to operate.**

§ 18. That the said commission may at any time, when the condition of the navigable rivers or when the capacities of all impounding and settling facilities erected by mine owners or such as may be provided by government authority require same, modify the order granting the privilege to mine by the hydraulic mining process so as to reduce amount thereof to meet the capacities of the facilities then in use, or if actually required in order to protect the navigable rivers from damage, may revoke same until the further notice of the commission.

**Intentional violation of order works a forfeiture of right to mine.**

§ 19. That an intentional violation on the part of a mine owner or owners, company, or corporation, or the agents or employees of either, of the conditions of the order granted pursuant to section thirteen, or such modifications thereof as may have been made by said commission, shall work a forfeiture of the privileges thereby conferred, and upon notice being served by the order of said commission upon such owner or owners, company, or corporation, or agent in charge, work shall immediately cease. Said commission shall take necessary steps to enforce its orders in case of the failure, neglect, or refusal of such owner or owners, company, or corporation, or agents thereof, to comply therewith, or in the event of any person or persons, company, or corporation working by said process in said territory contrary to law.

**Duty of commission to visit mines in operation.**

§ 20. That said commission, or a committee therefrom, or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operating under the provisions of this act. A report of such examination shall be placed on file.

**Public lands and timber and stone thereon may be used by the commission.**

§ 21. That the said commission is hereby granted the right to use any of the public lands of the United States, or any rock, stone, timber, trees, brush, or material thereon or therein, for any of the purposes of this act; and the secretary of the interior is hereby authorized and requested, after notice has been filed with the commissioner of the general land office by said commission, setting forth what public lands are required by it under the authority of this section, that such land or lands shall be withdrawn from sale and entry under the laws of the United States.

**Penalty for willfully injuring dams, and for working by hydraulic process contrary to law.**

§ 22. That any person or persons who willfully or maliciously injure, damage, or destroy, or attempt to injure, damage, or destroy, any dam or other work erected under the provisions of this act for restraining, impounding, or settling purposes, or for use in connection therewith, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed the sum of five thousand dollars or be imprisoned not to exceed five years, or by both such fine and imprisonment, in the discretion of the court. And any person or persons, company, or corporation, their agents or employees, who shall mine by the hydraulic process, directly or indirectly, injuring the navigable waters of the United States, in violation of the provisions of

this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court; provided, that this section shall take effect on the first day of May, eighteen hundred and ninety-three.

**Tax of three per cent of gross proceeds of mine to be paid into treasury of United States—Debris fund.**

§ 23. That upon the construction by the said commission of dams or other works for the detention of debris from hydraulic mines and the issuing of the order provided for by this act to any individual, company, or corporation, to work any mine or mines by hydraulic process, the individual, company, or corporation operating thereunder working any mine or mines by hydraulic process, the debris from which flows into or is in whole or in part restrained by such dams or other works erected by said commission, shall pay a tax of three per centum on the gross proceeds of his, their, or its mine so worked; which tax of three per centum shall be ascertained and paid in accordance with regulations to be adopted by the secretary of the treasury, and the treasurer of the United States is hereby authorized to receive the same. All sums of money paid into the treasury under this section shall be set apart and credited to a fund to be known as the "debris fund," and shall be expended by said commission under the supervision of the chief of engineers and direction of the secretary of war, in addition to the appropriations made by law in the construction and maintenance of such restraining works and settling reservoirs as may be proper and necessary; provided, that said commission is hereby authorized to receive and pay into the treasury from the owner or owners of mines worked by the hydraulic process, to whom permission may have been granted so to work under the provisions hereof, such money advances as may be offered to aid in the construction of such impounding dams or other restraining works, or settling reservoirs, or sites therefor, as may be deemed necessary by said commission to protect the navigable channels of said river systems, on condition that all moneys so advanced shall be refunded as the said tax is paid into the said debris fund; and provided further, that in no event shall the government of the United States be held liable to refund same except as directed by this section.

**Commission may consult with a commission of engineers authorized by the state to act.**

§ 24. That for the purpose of securing harmony of action and economy in expenditures in the work to be done by the United States and the state of California, respectively, the former in its plans for the improvement and protection of the navigable streams and to pre-

vent the depositing of mining debris or other materials within the same, and the latter in its plans authorized by law for the reclamation, drainage, and protection of its lands, or relating to the working of hydraulic mines, the said commission is empowered to consult thereon with a commission of engineers of said state, if authorized by said state for said purpose, the result of such conference to be reported to the chief of engineers of the United States army, and if by him approved shall be followed by said commission.

**Commission may construct dams to restrain debris already lodged in tributaries of main rivers—Certain recommendations adopted and made basis of operations—Appropriation.**

§ 25. That said commission, in order that such material as is now or may hereafter be lodged in the tributaries of the Sacramento and San Joaquin river systems resulting from mining operations, natural erosions, or other causes, shall be prevented from injuring the said navigable rivers, or such of the tributaries of either as may be navigable, and the land adjacent thereto, is hereby directed and empowered, when appropriations are made therefor by law, or sufficient money is deposited for that purpose in said debris fund, to build at such points above the head of navigation in said rivers and on the main tributaries thereof, or branches of such tributaries, or at any place adjacent to the same, which in the judgment of said commission, will effect said object (the same to be of such material as will insure safety and permanency), restraining or impounding dams and settling reservoirs, with such canals, locks, or other works adapted and required to complete same. The recommendations contained in executive document numbered two hundred and sixty-seven, fifty-first congress, second session, and executive document numbered ninety-eight, forty-seventh congress, first session, as far as they refer to impounding dams, or other restraining works, are hereby adopted, and the same are directed to be made the basis of operations. The sum of fifteen thousand dollars is hereby appropriated, from moneys in the treasury not otherwise appropriated, to be immediately available to defray the expenses of said commission.

## V. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Rights of way for roads, tunnels, ditches, flumes, and other easements for mining purposes. Code Civ. Proc., § 1238, subd. 5, "Eminent Domain."

For the rulings of the supreme court on this subject and a general discussion of this class of legislation, see §§ 252–264.

2. Act establishing a uniform system of mine bell signals. Stats. 1893, p. 82; Gen. Laws, 1909, p. 626 (Deering).

3. An act for the protection of stockholders in mining companies. Laws 1873–74, p. 866, amended Feb. 26, 1897, Stats. 1897, p. 38; Laws 1880, p. 131, amended Stats. 1897, p. 96. Repealed, Stats. 1905, p. 74.

4. Providing for the maintenance and establishment of a state mining bureau. Stats. 1913, p. 1327.

5. Mining partnerships. Civ. Code, §§ 2511–2520.

6. Providing for egress from mines (escape shafts). Stats. 1871–72, p. 413; Gen. Laws, 1909, p. 622 (Deering).

7. Defining hydraulic mining. Civ. Code, §§ 1424, 1425.

8. Providing for appointment of debris commissioner. Stats. 1893, p 339; amended March 17, 1897, Stats. 1897, p. 169.

9. Making appropriation for construction of debris dams subject to conditions of above act of 1893. Stats. 1901, p. 7.

10. Reserving rights of way over mining claims for purpose of working other mines. Stats. 1869–70, p. 569; Stats. 1891, p. 219. This legislation is of the same purport as subdivision 5 of section 1238 of the Code of Civil Procedure and is undoubtedly unconstitutional. Gen. Laws, 1909, p. 628 (Deering). For a discussion of the subject, see *ante*, §§ 252–264, particularly § 263.

11. Mining corporations. Civ. Code, §§ 584–590. Act supplemental thereto. Stats. 1871–72, p. 443. Repealed, revised and re-enacted by Stats. 1905, p. 584, which added provision relating to the inspection of mines and of a mining corporation and of the mine itself by stockholders.

12. Providing for order of court to permit litigants to enter and survey mine in dispute. Code Civ. Proc., §§ 742, 743.

13. Defining miner's inch of water. Stats. 1901, p. 660.

14. Defining servitudes. Civ. Code, §§ 801, 802.

15. Miner's cabin or dwelling exempt from execution. Code Civ. Proc., § 690.

16. Proof of local customs in actions affecting mining claims. Code Civ. Proc., § 748.

17. Mechanics' liens on mining claims. Code Civ. Proc., §§ 1183, 1188, 1192. Amended, Stats. 1911, p. 1314.

18. Effect of adverse holding of land for mining purposes where certification of purchase issued. Code Civ. Proc., § 1925.

19. Providing for the summary sale of mines belonging to estates of decedents. Code Civ. Proc., §§ 1529, 1530.

20. Providing for agreements to sell mining claims belonging to the estates of decedents. Code Civ. Proc., §§ 1577, 1580, as amended 1909.

21. Providing that the statement of the date of location in a United States patent for mineral lands shall be *prima facie* evidence of such date. Stats. 1905, p. 78; Code Civ. Proc., § 1927.

22. Regulating the hours of employment in underground mines and in smelting and reduction works. Stats. 1909, p. 279; Gen. Laws, 1909, p. 630 (Deering). Also Stats. 1913, p. 331.

23. Regulating the extraction of minerals from the waters of any stream or lake and prohibiting such extraction except under lease or express permission from state. Laws 1911, Part 1, p. 904.

24. Concerning mineral lands uncovered by recession or drainage of inland lakes. Amending § 3493m, Pol. Code, Stats. 1911, p. 903.

25. Waters containing minerals withdrawn from sale and provisions for leasing. Stats. 1911, p. 1154.

26. Prescribing the installation of a telephone system in underground mines. Stats. 1913, p. 782.

## COLORADO.

I. Legislation Relating to Lode Claims.
II. Legislation Relating to Placer Claims.
III. Legislation Relating to Tunnels and Tunnel Claims.
IV. Reference to Miscellaneous Legislation on Mining Subjects.

### I. LEGISLATION RELATING TO LODE CLAIMS.

**Lode claims—Length.**

§ 1. The length of any lode claim hereafter located may equal but not exceed fifteen hundred feet along the vein. Mills' Annot. Stats., § 3148; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4192.

The above regulation is merely a re-enactment of the federal rule as to length.

Subject discussed in text: § 361.

**Lode claims—Width.**

§ 2. The width of lode claims hereafter located in Gilpin, Clear Creek, Boulder and Summit counties, shall be one hundred and fifty feet on each side of the center of the vein or crevice; in all other counties the width of the same shall be three hundred feet on each side of the center of the vein or crevice; and the owner or owners of any lode claim or claims heretofore located and having a less width, desirous of securing the benefit of this act may file an additional certificate claiming such additional width as herein provided; provided, that hereafter any county may, at any general election, determine upon a greater width not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast as [at] said election, and any county by such vote at such election may determine upon a less width than above specified. Mills' Annot. Stats., § 3149; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4193; Amd. Stats. 1911, p. 515; Amd. Stats. 1913, p. 412; Amd. Stats. 1913, p. 413.

Subject discussed in text: § 361.
Location covering excessive area: § 362.

**Location certificate—Contents and record.**

§ 3. The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated,[1] by a location certificate, which shall contain: 1st, the name of the lode; 2d, the name of the locator; 3d, the date of location; 4th, the number of feet in length claimed on each side of the center of discovery shaft; 5th, the general course of

the lode as near as may be. Mills' Annot. Stats., § 3150; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4194.

Section referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record, and effect of failure to record within time limited: §§ 389, 390.

[1] Depositing with recorder for purpose of record is sufficient. Shepard v. Murphy, 26 Colo. 350, 58 Pac. 588.

**Records of mining districts to be filed with county clerk.**

§ 4. A copy of all the records, laws, and proceedings of each mining district, so far [as] they relate to lode claims, shall be filed in the office of the county clerk of the county in which the district is situated, within the boundaries of the district attached to the same, which shall be taken as evidence in any court having jurisdiction in the matters concerned in such record or proceeding; and all such records of deeds and conveyances, laws and proceedings of any mining district heretofore filed in the clerk's office of the proper county, and transcripts thereof duly certified, whether such records relate to gulch claims, lode claims, building lots, or other real estate, shall have the like effect as evidence. Mills' Annot. Stats., § 3147; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4258.

**Location certificate void unless containing the proper elements.**

§ 5. Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void. Mills' Annot. Stats., § 3151; Gen. Stats. 1883, p. 722; Rev. Stats. 1908, § 4195.

Effect of failure to comply with the law as to contents of certificate: § 384.
As to right of amendment, consult Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109.
See note to next paragraph.

**Lode claim—Discovery shaft—Preliminary notice.**

§ 6. Before filing such location certificate the discoverer shall locate his claim by: First, sinking a discovery shaft upon the lode, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice; [1] second, by posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery; [2] third, by marking the surface boundaries of

the claim. Mills' Annot. Stats., § 3152; Gen. Stats. 1883, p. 723; Rev. Stats. 1908, § 4197.

[1] "Crevice" means mineral-bearing vein: Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 958.
Statute referred to in text: § 343, p. 448.
Object of requirement as to development work: § 344.
Relation of discovery shaft to discovery: § 345.
Extent of development work: § 346.
Can preliminary development work be credited on first year's work? § 632.

[2] Preliminary notice and its posting discussed in text: §§ 350–356.
Place and manner of posting: § 356.
Liberal rules of construction applied to notices: § 355.

**Marking the boundaries.**

§ 7. Such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to wit: One at each corner and one at the center of each side line. Where it is practically impossible on account of bedrock to sink such posts, they may be placed on a pile of stones, and where, in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point,[1] suitably marked to designate the proper place. Mills' Annot. Stats., § 3153; Gen. Stats. 1883, p. 723; Rev. Stats. 1908, § 4198.

Section referred to in text: § 374.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the federal law: § 373.
Perpetuation of monuments: § 375.

[1] Croesus M. & M. Co. v. Colorado L. & M. Co., 19 Fed. 78; Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948.

**Equivalent of discovery shaft.**

§ 8. Any open cut, crosscut, or tunnel, which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. Mills' Annot. Stats., § 3154; Gen. Stats. 1883, p. 723; Rev. Stats. 1908, § 4199.

Subject of discovery shaft and its equivalent discussed in text: §§ 343–346.

**Discovery shaft, time within which it must be sunk.**

§ 9. The discoverer shall have sixty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon. Mills' Annot. Stats., § 3155; Gen. Stats. 1883, p. 723; Rev. Stats. 1908, § 4200.

See note to preceding section.

**Extralateral rights—Intralimital rights.**

§ 10. The location, or location certificate, of any lode claim shall be construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended downward, vertically, with such parts of all lodes or ledges as continue by dip beyond the side-lines of the claim, but shall not include any portion of such lodes or ledges beyond the end-lines of the claim or the end-lines continued, whether by dip or otherwise, or beyond the side-lines in any other manner than by the dip of the lode. Mills' Annot. Stats., § 3156; Gen. Stats. 1883, p. 723; Rev. Stats. 1908, § 4201.

**Same.**

§ 11. If the top or apex of a lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior lines. Mills' Annot. Stats., § 3157; Gen. Stats. 1883, p. 724; Rev. Stats. 1908, § 4202.

The above sections conform substantially to the provisions of § 2322 of the U. S. Rev. Stats. as interpreted by the courts: See *ante*, p. 2238, where the federal statute is given with notes referring to discussion in text.

That such legislation by a state is of questionable validity: See text, § 251.

**Amended location certificate—Change of boundaries.**

§ 12. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned; or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location. Mills' Annot. Stats., § 3160; Gen. Stats. 1883, p. 724; Rev. Stats. 1908, § 4210.

This section applies to placers: Kirk v. Meldrum, 65 Pac. 633.

Objects and functions of amended certificates discussed in text: § 398. See Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109; Duncan v. Fulton, 61 Pac. 244.

Circumstances justifying change of boundaries: § 396.

Privilege of changing boundaries exists in absence of intervening rights, independent of state legislation: § 397.

**Proof of labor.**

§ 13. Within six months after any set time, or annual period allowed for the performance of labor, or making improvements upon any lode claim or placer claim, the person on whose behalf such outlay was made, or some person for him, may make and record in the office of the recorder of the county wherein such claim is situate an affidavit, in substance as follows:—

State of Colorado,
——— County,—ss.

Before me, the subscriber, personally appeared ———, who, being duly sworn, saith that at least ——— dollars' worth of work or improvements were performed or made upon [here describe claim or part of claim], situate in ——— mining district, county of ———, state of Colorado, between the —— day of ———, A. D. ——, and the —— day of ———, A. D. ——. Such expenditure was made by or at the expense of ———, owners of said claim, for the purpose of complying with the law and holding said claim.

[Signature] ——— ———.

[Jurat]

And such affidavit when so recorded shall be *prima facie* evidence of the performance of such labor or the making of such improvements; provided, that all affidavits of labor or improvements upon placer claims heretofore filed and recorded within the period prescribed in this section, or within the period prescribed in section 2410 of the General Statutes, which shall contain in substance the requirements of the affidavit prescribed in this section or said section 2410, shall be *prima facie* evidence of the performance of such labor or the making of such improvements; and the original thereof, or a certified copy of the record of the same, shall be received as evidence accordingly by the courts of this state, and this class of evidence shall be receivable, where relevant or material, in all causes, whether now pending or hereafter brought. [As amended, Sess. Laws, 1889, pp. 261, 262.] Mills' Annot. Stats., § 3161; Rev. Stats. 1908, § 4209.

Proof of annual labor discussed in text: § 636.

**Relocation of abandoned claims.**

§ 14. The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts, if removed or destroyed. In either case a new location stake shall be erected. Mills' Annot. Stats., § 3162; Gen. Stats. 1883, p. 725; Rev. Stats. 1908, § 4211; amended, Stats. 1911, p. 515.

Statute referred to in text: § 408.
Circumstances under which relocation may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Right of second locator to improvements made by first: § 409.

**Location certificate must claim but one location.**

§ 15. No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location, it shall be absolutely void, except as to the first location therein described, and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all. Mills' Annot. Stats., § 3163; Gen. Stats. 1883, p. 725; Rev. Stats. 1908, § 4196.

Location certificate and its contents discussed in text: §§ 379–385.

## II. LEGISLATION RELATING TO PLACER CLAIMS.

**Placer claims—Posting notice—Marking boundaries—Location certificates.**

§ 1. The discoverer of a placer claim shall, within thirty days from the date of discovery, record his claim in the office of the recorder of the county in which said claim is situated, by a location certificate, which shall contain: First, the name of the claim, designating it as a placer claim. Second, the name of the locator. Third, the date of location. Fourth, the number of acres or feet claimed. And fifth, a description of the claim by such reference to natural objects or permanent monuments as shall identify the claim.[1] Before filing such location certificate the discoverer shall locate his claim: First, by posting upon such claim a plain sign or notice, containing the name of the claim, the name of the locator, the date of discovery, and the number of acres or feet claimed.[2] Second, by marking the surface boundaries with substantial posts and sunk in the ground, to wit: One at each angle of the claim.[3] Mills' Annot. Stats., § 3136; Gen. Stats. 1883, p. 718; Rev. Stats. 1908, § 4205.

What constitutes discovery: See text, § 437 and §§ 335–337.
Character of deposits subject to location under placer laws: See text, §§ 419–428, 85–98.

[1] Statute referred to in text: § 459.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with the law as to the contents: § 384.

[2] Posting notices: See § 442.

[3] Statute referred to in text: § 455.
Rule as to marking boundaries in absence of state legislation: § 454.

**Amended location certificate.**

§ 2. See same title, under "Lode Claims," § 16.

**Proof of labor.**

§ 3. See same title, under "Lode Claims," § 15.

**Location certificate must claim but one location.**

§ 4. See same title, under "Lode Claims," § 17.

## III. LEGISLATION RELATING TO TUNNELS AND TUNNEL CLAIMS.

**Tunnel claim—Record.**

§ 1. If any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein. Mills' Annot. Stats., § 3140; Gen. Stats. 1883, p. 720; Rev. Stats. 1908, § 4207.

Acts to be performed in acquiring tunnel rights: See text, § 472.

Regulations of the department concerning tunnel locations: *Ante*, pp. 2289, 2290.

Right of way for tunnel for transporting ores, etc., for hire: Revised Stats. of 1908, § 2435.

## IV. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that all mining claims shall be subject to a right of way for ditches or flumes, or tramway or pack-trail; and providing means of enforcing the easement. Mills' Annot. Stats., § 3158; Gen. Stats. 1883, p. 724; Rev. Stats. 1908, § 4216.

See text, §§ 252, 530, 531. Declared void, People ex rel. Aspen M. & S. Co. v. District Court, 11 Colo. 147, 17 Pac. 298.

2. Requiring miners to take care of the tailings from their mines. Mills' Annot. Stats., § 3144; Gen. Stats. 1883, p. 721; Rev. Stats. 1908, § 4214.

3. Provisions relating to the right of a party to an action for the recovery of the possession of a mining claim to enter the mine with consent of the court for the purpose of inspection. Mills' Annot. Stats., §§ 3164, 3176; Gen. Stats. 1883, pp. 725, 726; Rev. Stats. 1908, § 4218.

4. Regulating mining under buildings belonging to others. Mills' Annot. Stats., § 3139; Gen. Stats. 1883, p. 720; Rev. Stats. 1908, § 4213.

5. Providing for security to the owner of the surface when the ownership of the surface is separate from the right to mine. Mills' Annot. Stats., § 3159; Gen. Stats. 1883, p. 724; Rev. Stats. 1908, §§ 4217, 5134–5137.

See similar statute Idaho: *Post*, p. 2481. See, also, § 822 of the text.

6. Governing right of way for water brought to a mining claim Mills' Annot. Stats., § 3138; Gen. Stats. 1883, p. 720; Rev. Stats., p. 465, § 2; Rev. Stats. 1908, § 4212.

7. Governing right of way for hauling quartz. Mills' Annot. Stats., § 3145; Gen. Stats. 1883, p. 721; Rev. Stats., p. 466, § 9; Rev. Stats. 1908, § 4215.

8. Providing for the formation of mine drainage districts. Laws 1911, p. 508.

9. Penalty for unlawful entry. Gen. Stats. 1883, pp. 726, 727; Mills' Annot. Stats., §§ 3165, 3166.

10. Relating to the drainage of mines. Mills' Annot. Stats., §§ 3172–3180; Gen. Stats. 1883, pp. 727–729; Rev. Stats. 1908, §§ 4226–4234.

11. Relating to ores, including the requirement that persons engaged in reducing, shipping, or purchasing ores keep records, and providing a punishment for stealing ores or knowingly purchasing stolen ores. Mills' Annot. Stats., §§ 3227, 3234; Gen. Stats. 1883, pp. 747–749; Laws 1903, p. 370; Mills' Annot. Stats. [Supp.], p. 869; Rev. Stats. 1908, § 4243.

An enactment substantially similar relating to free gold, gold-dust, gold amalgam, gold nuggets, gold specimens, gold bullion, silver nuggets, and silver bullion. Mills' Annot. Stats., §§ 3243–3247; Laws of 1889, pp. 183, 184; Rev. Stats. 1908, §§ 4252–4256.

12. Making anyone stealing ores guilty of grand larceny and repealing all acts in conflict. Laws 1907, p. 336; Rev. Stats. 1908, § 1680.

13. Providing that all persons stealing ores or precipitates or concentrates from smelters, mills or other reduction works shall be guilty of grand larceny and repealing all acts in conflict. Laws 1909, p. 541.

14. Defining a miner's inch. Mills' Annot. Stats., § 4643; Gen. Stats. 1883, p. 1015; Rev. Stats. 1908, §§ 3330, 7026.

15. Punishing the use of false weights for weighing gold or gold-dust. Mills' Annot. Stats., § 1380; Gen. Stats. 1883, p. 343; Rev. Stats. 1908, § 4240.

16. Punishing mill owners for failure to turn over the proceeds extracted from ore to the rightful owner. Mills' Annot. Stats., § 1381; Gen. Stats. 1883, p. 343; Rev. Stats. 1908, § 4242.

17. Passing counterfeit gold-dust. Mills' Annot. Stats., §§ 1262, 1263; Gen. Stats. 1883, p. 314; Rev. Stats. 1908, §§ 1708, 1709.

18. Punishing the salting of ores. Mills' Annot. Stats., § 1391; Gen. Stats. 1883, p. 346; Rev. Stats., § 1863.

19. Punishing the destruction or carrying away boundary marks or timber in a mine. Mills' Annot. Stats., § 3171; Rev. Stats. 1908, § 1899.

20. An act to create a bureau of mines, to define the duties of the commissioner of mines and provide for the government thereof; and to repeal an act entitled "An act dividing the state of Colorado into

metalliferous mining districts," approved April 1, 1889. Laws 1895, p. 206; Mills' Annot. Stats. [Supp.], p. 857; Amended Laws 1899, p. 277; Laws 1903, pp. 368, 369; Mills' Annot. Stats. [Supp.], pp. 856–862; Rev. Stats. 1908, §§ 4259–4279; Amended Laws 1911, p. 223.

21. Providing that defendants defeated in any action to recover possession of any lode, vein, or mining claim shall not be entitled to any offset for any timbering, cribbing, improvement, or development made upon the same. Part of ch. 62, Laws 1895, p. 142.

22. Regulating the working of coal mines. Laws of 1893, pp. 347–349, amending an act approved February 24, 1883; Mills' Annot. Stats. [Supp.], p. 851; Rev. Stats. 1908, §§ 638–660.

23. Providing for recovery of value of ore wrongfully mined, extracted, or taken out from the ground of another. Laws 1893, p. 349; Mills' Annot. Stats. [Supp.], p. 850; Rev. Stats. 1908, § 4219.

24. Relating to the duties of county assessors in assessing mining claims entered or patented. Laws 1891, p. 113; Mills' Annot. Stats. [Supp.], p. 883; Rev. Stats. 1908, § 5623.

25. Relating to lode mines, lode mining claims, or mining property that cannot be partitioned. Laws 1893, p. 358; Mills' Annot. Stats. [Supp.], p. 880.

26. Regulating the hours of employment in mines and smelters, and providing penalty for violation. Laws 1899, p. 232; Mills' Annot. Stats. [Supp.], p. 751; Rev. Stats. 1908, § 3915.

27. Giving miners and materialmen liens on mines or mills for labor expended thereon. Laws 1899, p. 266; Mills' Annot. Stats. [Supp.], p. 774; Rev. Stats. 1908, §§ 4028–4045; Laws 1911, p. 493.

28. Prescribing a special procedure for assessing and taxing lands bearing minerals other than gold and silver. Laws 1899, p. 327; Rev. Stats. 1908, § 5629.

29. Providing for the employment of the check weighman at coal mines. Laws 1897, pp. 137, 138; Mills' Annot. Stats. [Supp.], p. 854; Rev. Stats. 1908, §§ 663–667.

30. Providing a penalty for the removal of trees, timber, or buildings from a mining claim without the consent of the owner, and defining owners of mining claims within the meaning of the act. Mills' Annot. Stats., §§ 3167–3170; Laws 1888, p. 460; Rev. Stats. 1908, §§ 4222–4225.

31. Prescribing method of assessment and taxation of mines and mining property. Mills' Annot. Stats., §§ 3222–3226; Laws 1887, pp. 340, 341; Rev. Stats. 1908, §§ 5617–5627.

32. Specifying who are to be deemed owners of ore, and prescribing a method by which the rightful owner of a mining claim may hold purchaser of ore from one wrongfully in possession responsible therefor. Mills' Annot. Stats., §§ 3235–3242; Laws 1889, pp. 273–275; Rev. Stats. 1908, §§ 4244–4251.

33. Requiring owners or lessees of coal mines to weigh in the pit car or other apparatus the coal mined by each miner and credit him therewith before passing the coal over a screen or other device. Laws 1901, pp. 235–237; Mills' Annot. Stats. [Supp.], pp. 855, 856; Rev. Stats. 1908, §§ 663, 664.

34. Authorizing owners of coal or other mineral lands to connect the same with any railroad by a connecting spur not exceeding fifteen miles in length and granting right of eminent domain for that purpose. Laws 1901, p. 237; Mills' Annot. Stats. [Supp.], p. 849; Rev. Stats. 1908, § 2464.

35. Penalty for false certificate concerning sale of ores. Rev. Stats. 1908, § 4241.

See special act of congress relating to school lands in Colorado: Supp. to Rev. Stats. U. S., ch. 20, p. 424.

36. Prohibiting directors of mining corporations from encumbering mines or machinery without prior vote of majority of stock. Mills' Annot. Stats., § 481; Amended Laws 1895, pp. 150, 152; Mills' Annot. Stats. [Supp.], p. 233; Rev. Stats. 1908, § 865.

37. Relating to corporations organized to supply water to mines. Laws 1891, p. 97; Rev. Stats. 1908, §§ 988–997.

38. Prohibiting interference with cars used in mines. Laws 1903, p. 203; Mills' Annot. Stats. [Supp.], § 1422a; Rev. Stats. 1908, § 1896.

39. Providing for condemnation of rights of way for mining purposes. Mills' Annot. Stats., § 1716; Laws 1901, p. 173; Mills' Annot. Stats. [Supp.], § 1716; Rev. Stats. 1908, §§ 2416, 2420.

40. Providing for condemnation of rights of way for tunnel purposes. Laws 1891, p. 98; Mills' Annot. Stats. [Supp.], p. 264; Rev. Stats. 1908, § 2435.

41. Creating a mineral department to inspect mines. Laws 1903, pp. 384, 385; Mills' Annot. Stats. [Supp.], pp. 935, 936; Rev. Stats. 1908, §§ 4259–4306.

42. Defining tunnels as real estate. Laws 1902, p. 156; Mills' Annot. Stats. [Supp.], p. 1108; Rev. Stats. 1908, § 5776.

43. Defining mines as being real estate. Laws 1902, pp. 45, 46; Mills' Annot. Stats. [Supp.], p. 1013; Rev. Stats. 1908, § 5540.

44. Concerning pollution of fish streams. Laws 1899, pp. 213, 214; Mills' Annot. Stats. [Supp.], p. 578; Rev. Stats. 1908, §§ 2820, 2821.

45. The Tunnel Act of April 17, 1897 (Laws 1897, pp. 181, 182), was held void by Judge Hallett in Cone v. Roxana G. M. Co., 2 Legal Adv. 250, and was omitted from the Revised Statutes of Colorado of 1908.

46. Providing for assessing mines situated in more than one county. Laws 1902, p. 156; Mills' Annot. Stats. [Supp.], p. 1108; Rev. Stats. 1908, § 5778.

47. Providing for description of mines in tax schedules. Laws 1891, p. 113; Laws 1902, p. 60; Rev. Stats. 1908, §§ 5575, 5576, 5621.

48. Providing for the location of mineral claims upon state or school lands and securing title thereto. Laws 1905, pp. 319, 342; Rev. Stats. 1908, §§ 5215, 5216.

49. Providing that the state board of land commissioners may lease state lands containing stone, coal, oil, gas, or other mineral, for the purpose of removing such minerals. Rev. Stats. 1908, §§ 5175, 5213; Amended 1909, p. 504.

50. Regulating the construction, equipment and operation of metalliferous mines, mills and metallurgical plants, including storage of explosives, tamping bars, hoisting apparatus, signals, fire protection, shafts, equipment, safety ladders, clutches, guard-rails, and related subjects. Laws 1903, pp. 360–367; Mills' Annot. Stats. [Supp.], pp. 863–868; Rev. Stats. 1908, §§ 4280–4306.

51. Punishing loitering about streets or places of business for the purpose of influencing or inducing others not to trade with or work for the proprietor or ticketing the works, mine building or other place of business of such persons. Laws 1905, p. 160; Rev. Stats. 1908, §§ 396–402.

52. Regulating the hours of employment in underground mines, mine or other workings, smelter, ore-reduction works, stamp-mills, chlorination and cyanide mills and blast furnaces and providing a penalty for violation. Laws 1905, p. 284. See Mills' Annot. Stats. [Supp.], p. 15; Rev. Stats. 1908, §§ 3912, 3914.

53. Prohibiting the employment of children under sixteen years of age for more than eight hours per day in or about coal mines. Laws 1903, p. 309; Mills' Annot. Stats. [Supp.], p. 757; Rev. Stats. 1908, § 3915.

54. Prohibiting employment of children under fourteen years of age. Laws 1903, p. 310; Mills' Annot. Stats. [Supp.], p. 758; Rev. Stats. 1908, § 3918.

55. Requiring annual report of mining and coal corporations. Laws 1901, pp. 121–125; Mills' Annot. Stats. [Supp.], pp. 239, 240; Rev. Stats. 1908, § 911.

56. Regulating levy of assessments on stock of mining companies. Laws 1891, p. 100; Mills' Annot. Stats. [Supp.], p. 259; Rev. Stats. 1908, §§ 975–983.

57. Regulating royalties on coal lands operated under lease from state. Laws 1903, p. 385; Mills' Annot. Stats. [Supp.], p. 936; Rev. Stats. 1908, § 5214.

58. Punishing conspiracy to seize mining claims. Laws 1874, p. 192; Rev. Stats. 1908, §§ 4220, 4221.

59. Prohibiting removal of guard around shaft. Laws 1885, p. 276; Rev. Stats. 1908, § 1900.

60. Providing for the health and safety of coal miners and for inspection of coal mines. Laws 1913, p. 162.

# IDAHO.

I. Persons Who may Locate and Hold Mining Claims.
II. Provisions Relating to Lode Claims.
III. Provisions Relating to Placer Claims.
IV. Provisions Affecting Both Lode and Placer Claims.
V. Reference to Miscellaneous Legislation on Mining Subjects.

## I. PERSONS WHO MAY LOCATE AND HOLD MINING CLAIMS.

§ 1. Any person, whether citizen or alien (except as hereinafter provided), natural or artificial, may take, hold, and dispose of mining claims and mining property, real or personal, tunnel rights, millsites, quartz-mills and reduction works used or necessary or proper for the reduction of ores, and water rights used for mining or milling purposes, and any other lands or property necessary for the working of mines or the reduction of the products thereof; provided, that Chinese, or persons of Mongolian descent not born in the United States, are not permitted to acquire title to land or any real property under the provisions of this and the preceding sections. Civ. Code (1901), § 2555; Stats. 1899, p. 99; Rev. Code 1907, § 2610.

Citizens: §§ 223–227.
Aliens: §§ 231–234.
General property rights of aliens in the states: §§ 237, 238.
General property rights of aliens in the territories: §§ 242–244.

## II. PROVISIONS RELATING TO LODE CLAIMS.

**Width of lode claim—Line of vein not to be changed.**

§ 1. Mining claims hereafter located upon veins or lodes of quartz or other rock in place bearing any of the metals or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States may extend to three hundred feet on each side of the middle of the vein or lode; provided, that when the locators have set stakes, posts, or monuments described in the following section, to indicate the line of the vein, ledge, or lode, such stakes, posts, or monuments must be taken for the purpose of such location, to mark correctly the line thereof, and such line must not afterward be changed so as to affect rights acquired or interfere with any locations made subsequent thereto. Civ. Code (1901), § 2556; Laws 1895, p. 25; Rev. Code (1907), § 3206.

Width of lode claims generally: § 361.

**Preliminary notice—Marking boundaries—Notice of location—Location monuments.**

§ 2. The locator, at the time of making the discovery of such vein or lode must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery, and distance claimed along the vein each way from such monument. Within ten days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side-lines, a monument marked with the name of the claim and the corner or angle it represents; also at the time of so marking his boundaries, he must post at his discovery monument his notice of location, in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction [1] from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself, the location of the claim; and seventh, the name of the mining district, county, and state.[2]

When, from any cause, a monument cannot be safely planted at the true corner or angle it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner or angle. Monuments may be made of any such material or form as will readily give notice, and when of posts or trees, they must be hewn and marked upon the side facing toward the discovery, and must be at least four inches square or in diameter.[3] Monuments must be at least four feet high above the ground, and trees must be so hewn as to readily attract attention. At the time the locator so marks the boundaries of his claim he may do so in any direction that will not interfere with rights or claims which existed prior to his discovery. Civ. Code (1901), § 2557; Laws 1895, p. 26; Laws 1899, p. 633; Rev. Code (1907), § 3207.

[1] Failure to comply with this requirement invalidates the location: Clearwater Short Line Ry. Co. v. San Garde, 61 Pac. 137. See, also, Brown v. Levan, 46 Pac. 661.

[2] Statute referred to in text: §§ 354–380.
Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.

[3] Object of and necessity for marking: § 371.
Time allowed for marking: §§ 372, 339.
What is sufficient marking under federal law discussed: § 373.
Statute referred to in text: § 374.
Perpetuation of monuments discussed: § 375.

**Discovery shaft and equivalent—Claim, when open to relocation.**

§ 3. Within sixty days after such location, the locator or his assigns must sink a shaft upon the lode to the depth of at least ten feet from

the lowest part of the rim of such shaft at the surface, and of not less than sixteen square feet area. Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft, and which shall measure one hundred and sixty cubic feet in extent, shall be considered a compliance with this provision. Any located claim upon which work has been done in compliance with the above requirements is not, unless abandoned, subject to relocation for a period of ninety days from and after the date of location. Civ. Code (1901), § 2558; Laws 1895, p. 27; Rev. Code (1907), § 3208.

Section referred to in text: § 343.
Object of requirement as to development work discussed: § 344.
Relation of discovery to discovery shaft: § 345.
Extent of development work: § 346.

**Copy of notice of location to be recorded.**

§ 4. Within ninety days after the location of the claim, the locator or his assigns must file for record in the office of the county recorder of the county, or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location. Civ. Code (1901), § 2559; Laws 1895, p. 27; Rev. Code (1907), § 3209.

Certificate must be verified: See *post*, § 1, ch. 4 of this act.
Statute referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction of location notices: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record: § 389.
Effect of failure to record within time limited: § 390.
Proof of record: § 391.
Record as evidence: § 392.

**Abandoned claims, how located.**

§ 5. The location of abandoned claims shall be done in the same manner as if the location were a new claim; but the locator may, instead of sinking a new discovery shaft, sink the original discovery shaft ten feet deeper than it was at the time of his location, or he may drive the open cut or tunnel ten feet farther along the course of the lead, lode, or vein, and must erect new posts or monuments. Civ. Code (1901), § 2560; Laws 1895, p. 28; Rev. Code (1907), § 3212.

Section referred to in text: § 408.
Circumstances under which relocations may be made: § 402.
New discovery not essential: § 403.
Relocation by original locator: § 405.
Relocation by agent or others occupying contractual or fiduciary relations with original locator: § 407.
Relocation by one of several co-owners in hostility to others: § 406.
Right of second locator to improvements made by first: § 409.

**Location notice claiming more than one location void.**

§ 6. No location notice shall claim more than one location, whether the location is made by one or several locators, and if it purport to

claim more than one location it is absolutely void. Civ. Code (1901), § 2561; Laws 1895, p. 28; Rev. Code (1907), § 3213.

## III. PROVISIONS RELATING TO PLACER CLAIMS.

**Placer claims may be located.**

§ 1. Placer claims, as mentioned in section 2329 of the Revised Statutes of the United States, may be located for the purpose of mining deposits and precious stones after the discovery of such deposits. Civ. Code (1901), § 2562; Laws 1895, p. 29; Rev. Code (1907), § 3221.

What deposits are subject to location under placer laws? See text, §§ 419–428.

**Placer claims—Marking boundaries—Preliminary notice—Development work—Location certificate.**

§ 2. The locator of any placer mining claim located for the purpose of mining placer deposits or precious stones must, at the time of making the location, place a substantial post or monument as is required in the location of quartz claims at each corner of the location,[1] and must also post on one of the same a notice of location containing the date of the location, the name of the locator, the name and dimensions of the claim, the mining district (if any) and county in which the same is situated; and must also give the distance and direction from said post or monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself, the location of the claim.[2]

Within fifteen days after making the location, the locator must make an excavation upon the claim of not less than one hundred cubic feet, for the purpose of prospecting the same.[3]

Within thirty days after the location, the locator must file for record in the office of the recorder of the county, or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location, to which must be attached an affidavit such as is required in case of quartz claims. Civ. Code (1901), § 2563; Laws 1897, p. 12; Rev. Code (1907), § 3222.

[1] Marking location on ground in absence of state legislation: § 454.
[2] See text, § 442.
[3] See text, § 443.
What deposits subject to appropriation under placer laws: See text, §§ 419–428.
Form and extent of placer locations: §§ 447, 448.

## IV. PROVISIONS AFFECTING BOTH LODE AND PLACER CLAIMS.

**Affidavit that claim is open to location.**

§ 1. At or before the time of presenting a location notice for record, whether it be for a quartz or placer claim, one of the locators named

in the same must make and subscribe an affidavit in writing on or attached to the notice, substantially as follows, to wit:—

State of Idaho,
County of ———,—ss.

I, ———, do solemnly swear that I am a citizen of the United States of America (or have declared my intentions to become such), and that I am acquainted with the mining ground described in this notice of location, and herewith called the ——— ledge, lode, or claim; that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this state, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and (in the case of quartz claims) that I have opened new ground to the extent or depth of ten feet as required by the laws of Idaho.

[Signature.] ——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 19——.

[Signature.] ——— ———.

Civ. Code (1901), § 2564; Laws 1895, p. 29, § 13; Rev. Code (1907), § 3216.

Section referred to in text: §§ 251–385.

This affidavit may be made by an agent (Dunlap *v.* Patteson, 42 Pac. 504), but not before a deputy district recorder. Van Buren v. McKinley, 66 Pac. 936.

**Affidavit of performance of annual labor.**

§ 2. Within sixty days after any time set or period allowed for the performance of labor, or making improvements upon any lode or placer claim, the person in whose behalf such work or improvement is performed, or some person for him, must make and record an affidavit in substance as follows:—

State of Idaho,
County of ———,—ss.

Before me, the subscribed, personally appeared ———, who, being first duly sworn, says that at least ——— dollars' worth of work or improvements were performed or made upon ——— claim, situate in ——— mining district, county of ———, state of Idaho; that such expenditure was made by, for, or at the expense of ———, owner of said claim, for the purpose of holding said claim; all stakes, monuments, or trees marking boundaries of said claims are in proper place and positions.

——— ———.

Subscribed and sworn to before me this —— day of ———, 19——.

——— ———.

The fee for administering the oath and recording the foregoing affidavit, when taken before any county recorder or deputy mineral recorder, shall be fifty cents: *Provided, however,* That any number of claims in the same mining district, belonging to the same person or persons, association or corporation, may be included in one affidavit without the additional charge. The fee for recording the same, when the oath is taken before any other officer authorized to administer oaths, shall be fifty cents.

Such affidavit, or a certified copy thereof in case the original is lost, shall be *prima facie* evidence of the performance of such labor. The failure to file such affidavit shall be considered *prima facie* evidence that such labor has not been done. Civ. Code (1901), § 2565, amending Laws 1895, p. 27; Amd. 1899, p. 634; Rev. Code (1907), § 3211; Amd. Laws 1913, p. 308.

Proof of annual labor discussed: § 636.

**Amended location certificates—Change of boundaries.**

§ 3. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing the surface boundaries, or of taking any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this chapter, such locator or his assigns may file an additional certificate subject to the conditions of this chapter and to contain all that this chapter required an original certificate to contain; provided, that such amended location does not interfere with the existing rights of others at the time when such amendment is made. Civ. Code (1901), § 2566; Laws 1895, p. 27; Rev. Code (1907), § 3210.

Section referred to in text: § 397.
Objects and functions of amended certificates discussed: § 398.

**Deputy recorders, when and how chosen.**

§ 4. For the convenience of prospectors and locators, the county recorders of the several counties must appoint a deputy at any place where they may deem it necessary, and at all places more than twenty miles distant from an existing office whenever ten or more mining locators interested petition for the appointment of a deputy. Upon failure of any recorder to appoint a deputy for ten days after the petition in writing has been presented to him, the resident miners in such district may appoint temporarily one of their number to act as the recorder for the district, whose record shall be as valid as if made by the deputy, and must be entered by the recorder as hereinafter re-

quired; *provided*, that whenever at any time afterwards the recorder has appointed a deputy for such district or place, the authority of the person elected by the resident miners ceases. Civ. Code (1901), § 2567; Stats. 1895, p. 28; Rev. Code (1907), § 3215.

Neither a district recorder appointed by resident miners nor a deputy appointed by the recorder have power to appoint a deputy. Van Buren v. McKinley (Idaho), 66 Pac. 936.

**Security must be given to surface owner.**

§ 5. When the right to mine is in any case separate from the ownership or right of occupancy of the surface ground the owners or rightful occupants of the surface ground may demand satisfactory security from the miners, and if it be refused or not given, may enjoin such miners from working such ground until such security is given. The court granting the writ of injunction shall fix the amount and nature of the security. Civ. Code (1901), § 2571; Laws 1895, p. 29; Rev. Code (1907), § 3214.

Subjacent support: §§ 818–822.
Legislation of this character discussed: § 822.

**Location notice, how recorded.**

§ 6. The location notice herein required to be recorded must be recorded by the deputy appointed for the district, or the person appointed for that purpose as above provided (when the legal fee therefor is tendered), in a book to be kept for that purpose. Said book must be indexed, with the names of all the locators arranged in alphabetical order, according to the family or surname of each. The fee to be tendered for making such record, administering the oath to the locator and certifying the same, for indexing the names appearing on the notice and to include recording the notice by the recorder as hereinafter required, and the indexing by said recorder, is two dollars, which fee must be equally divided between the recorder and the deputy or the person acting under an election, as hereinbefore provided, and no other additional sum of money must be demanded or received by either of them for any services connected with the recording of any location notice made pursuant to the requirements of this chapter. Civ. Code (1901), § 2568; Laws 1895, p. 30, § 14; Rev. Code (1907) § 3217.

As to records of mining claims generally, see §§ 389–392.

**Local rules and customs.**

§ 7. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim, and such customs, usages, or regulations, when not in conflict with the laws of this state, must

govern the decision of the action. Rev. Stats. 1887, § 4547; Code Civ. Proc. (1901), § 3388; Rev. Code (1907), § 4547.

Local rules and customs: §§ 41–46.

**Owner of tunnel may continue it through claim of another.**

§ 8. Any person or company who has or may hereafter have a tunnel or crosscut, the mouth of which is located upon his own ground, or upon ground in his lawful occupation, shall have the right to drive and continue the same through and across any located or patented claim in front of the mouth of such tunnel, but not to follow or drive upon any vein belonging to the owner of such claim. Civ. Code (1901), § 2575; Laws 1899, p. 653; Rev. Code (1907), § 3236.

A statute substantially similar in Colorado was held to be clearly void in Cone v. Roxana G. M. Co., 2 Legal Adv. 250.

Discussion of constitutionality of statutes granting rights of way through property of others for mining purposes: §§ 254–264.

Provisions of federal law on subject of tunnel rights: U. S. Rev. Stats., § 2323; *ante*, p. 2239.

Manner of perfecting tunnel locations: §§ 472–475.

Length upon discovered lode of tunnel location: § 481.

Withdrawal of surface from exploration by inception of tunnel rights: §§ 483–491.

**Right of owner of intersected vein or claim to enter and inspect—Forfeiture of right to continue tunnel.**

§ 9. Each tunnel or crosscut may be driven and worked for the purpose of drainage, and for the purpose of reaching and working mining ground of the tunnel owner beyond the intersected claim. The owner or owners of any vein or any claim or claims so intersected or his duly authorized agent, shall have the right to enter such tunnel upon application to the owner or owners or person in charge of said tunnel without resorting to any process of law for the purpose of making a survey and inspecting such vein or veins as may be crossed within the boundary lines of such intersected claim, and if the owner or owners of such tunnel shall, by bulkheading, damming back, or in any manner prevent the inspection or survey herein provided for, or if such owner or owners shall in any manner prevent the natural drainage of water from such intersected claim or claims, without the consent of the owner or owners thereof, it shall work a forfeiture of all rights granted under the preceding section. Civ. Code (1901), § 2576; Laws 1899, p. 653; Rev. Code (1907), § 3237.

Validity of statutes authorizing inspection and survey without suit: § 873.

**Ownership of ore of intersected claim at point of intersection—Damage.**

§ 10. If any ore, the property of the owner of the claim intersected or crossed, be extracted in driving such tunnel, it shall be the property

of the owner of the vein from which it was taken, and the owner of the tunnel shall be liable for all actual damages or injury done to the owner of the claim crossed by his tunnel. Civ. Code (1901), § 2577; Laws 1899, p. 653; Rev. Code (1907), § 3238.

**Ownership of vein in tunnel—Burden of proof.**

§ 11. In all actions between the tunnel owner and others involving the right to any vein discovered in such tunnel, the burden of proving that the vein so discovered is not the property of the adverse claimant in such action shall be on the tunnel owner. Civ. Code (1901), § 2578; Laws 1899, p. 654; Rev. Code (1907), § 3239.

When tunnel proprietor not called upon to adverse mineral application for patent: § 725.

## V. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that deputy recorder must transmit records to county recorder. Civ. Code (1901), § 2569; Rev. Code (1907), § 3218.

2. Providing that county recorder must transmit records to deputy mining recorder. Laws 1903, p. 290; Rev. Code (1907), § 3219.

3. Defining powers and duties of deputy recorders. Civ. Code (1901), § 2570; Rev. Code (1907), § 3220.

4. Providing that destruction or defacement of location notice shall be punishable as a misdemeanor. Pen. Code (1901), § 5096; Rev. Code (1907), § 7172.

5. Tools of a miner not exceeding in value the sum of $400 are exempt from taxation. Mining claims not patented are also exempt, but property and improvements upon or appurtenant to mining claims are not exempt. Pol. Code (1901), § 1312, subds. 8, 11; Rev. Code (1907), § 1644, subd. 8.

6. Creating the office of inspector of mines and defining the duties of the inspector. Pol. Code (1901), §§ 139–152; Rev. Code (1907), §§ 199–209.

7. Prescribing penalty for failure of mine owner to comply with notice given by inspector of mines under section 144 of the Political Code. Pen. Code (1901), § 4761; Rev. Code (1907), § 202.

8. Laws relating to mining partnerships. Civ. Code (1901), §§ 2774–2784; Rev. Code (1907), §§ 3361–3372.

Referred to in text: § 790.

9. Rights of way and easements for development of mines. Civ. Code (1901), §§ 2572–2574; Rev. Code (1907), §§ 3223–3235.

See text, § 252.

10. Limiting proprietorship of aliens to mining property. Civ. Code (1901), §§ 2355, 2555; Rev. Code (1907), § 2609.

11. Regulating the disposition of mining interests of decedents. Code Civ. Proc. (1901), §§ 4166–4170; Rev. Code (1907), §§ 5499–5503.

12. Providing for the recordation of prospecting and mining contracts. Civ. Code (1901), § 2784.

13. Prescribing five years as period of limitation of actions concerning possessory rights to mining claims. Code Civ. Proc. (1901), § 3117; Rev. Code (1907), § 4036.

14. Providing for an order of court for examination and survey of mines in dispute and workings therein, and prescribing method of procedure. Code Civ. Proc. (1901), §§ 3383, 3384; Rev. Code (1907), §§ 4542–4543.

15. Authorizing the working of mines on public lands occupied, claimed, or located for agricultural purposes, upon payment for crops destroyed. Code Civ. Proc. (1901), § 3389; Rev. Code (1907), § 4552.

16. Providing that the right to conduct mining operations and to use the waters of any stream in the state therefor shall not be abridged by the provisions of the act for the improvement of rivers, etc. Pol. Code (1901), § 1133.

17. Providing for a permanent state mineral exhibit. Laws 1901, p. 186.

18. Providing that in actions involving title or right to possession of mines or mining claims, or damages thereto, at the request of either party, the court shall prevent the jury from separating during the trial. Code City Proc. (1901), § 3468; Rev. Code (1907), § 4387.

19. Defining mines, minerals, and quarries in land to be real property for the purposes of taxation. Pol. Code (1901), § 1313; Rev. Code (1907), § 1646.

20. Providing for the assessment of mining ditches. Pol. Code (1901), § 1356; Rev. Code (1907), § 1656.

21. Providing that miner's cabin and sluice-pipes, hose, windlass, derricks, cars, pumps, and tools to the value of $200, and pack animals and saddle animal to value of $250 shall be exempt from execution. Laws 1899, p. 251; Rev. Code (1907), § 4480, par. 5.

22. Providing for the assessment and taxation of mines, mining claims, improvements, and net annual proceeds. Laws 1903, pp. 4–7; Rev. Code (1907), §§ 1863–1872.

23. Providing for the leasing by the board of state land commissioners of state lands containing stone, coal, coal oil, gas, or other mineral or precious metals. Laws 1905, pp. 131, 137, §§ 13, 14.

24. Limiting the period of employment of workingmen in all underground mines or workings (§ 1463) and in smelters and all institutions for the refining or reduction of ores or metals (§ 1464) to eight hours per day, and fixing a penalty for violation (§ 1465). Laws 1907, p. 97;

Rev. Pol. Codes 1907, §§ 1463, 1464, 1465; § 1464 amended, Laws 1909, p. 5.

25. Regulating the operation and equipment of mines and providing a penalty for violation. Laws 1909, p. 266.

26. Requiring persons and corporations engaged in working or developing mines to publish statement under oath and file statement with county and district recorder, and fixing a penalty for violation. Laws 1899, p. 365; Rev. Pol. Codes 1907, §§ 1446, 1447.

27. Allowing certain creditors to perform assessment work upon unpatented claim of debtor. Laws 1911, p. 568.

28. Requiring investment reports from mining corporations. Laws 1913, p. 460.

# MONTANA.

I. Laws Relating to the Location and Development of Mining Claims.

II. Reference to Miscellaneous Legislation on Mining Subjects.

## I. LAWS RELATING TO THE LOCATION AND DEVELOPMENT OF MINING CLAIMS.

**Location of mining claims—Discovery notice, marking boundaries—Sinking shaft.**

§ 1. Any person who discovers upon the public domain of the United States, within the state of Montana, a vein, lode or ledge of rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, or a placer deposit of gold, or other deposit of minerals having a commercial value which is subject to entry and patent under the mining laws of the United States, may, if qualified by the laws of the United States, locate a mining claim upon such vein, lode, ledge or deposit, in the following manner, viz.:

1. He shall post, conspicuously, at the point of discovery a written or printed notice of location, containing the name of the claim, the name of the locator, (or locators, if there be more than one,) the date of the location, which shall be the date of posting such notice, and the approximate dimensions of area of the claim intended to be appropriated.

2. Within thirty days after posting the notice of location, he shall distinctly mark the location on the ground so that its boundaries can be readily traced. It shall be *prima facie* evidence that the location is properly marked if the boundaries are defined by a monument at each corner or angle of the claim, consisting of any one of the following kinds: (1) A tree at least eight inches in diameter, and blazed on four sides. (2) A post at least four inches square by four feet six inches in length, set one foot in the ground, unless solid rock should occur at a less depth, in which case the post should be set upon such rock, and surrounded in all cases by a mound of earth or stone at least four feet in diameter by two feet in height. A squared stump, of the requisite size, surrounded by such mound, shall be deemed the equivalent of a post and mound. (3) A stone at least six inches square by eighteen inches in length, set two-thirds of its length in the ground, with a mound of earth or stone alongside at least four feet in diameter by two feet in height, or (4) a boulder at least three feet above the natural surface of the ground on the upper side. Where

other monuments, or monuments of lesser dimensions than those above described, are used, it shall be a question for the jury, or for the court where the action is tried without a jury, as to whether the location has been marked upon the ground so that its boundaries can be readily traced. Whatever monument is used, it must be marked with the name of the claim and the designation of the corner, either by number or cardinal point.

3. Within sixty days after posting such notice, he shall sink a shaft upon the vein, lode or deposit at or near the point of discovery, to be known as the discovery shaft. Such shaft shall be sunk to the depth of at least ten feet, vertically, below the lowest part of the rim of such shaft at the surface, or deeper if necessary to disclose the vein or deposit located, and the cubical contents of such shaft shall not be less than one hundred and fifty cubic feet; *provided*, that any cut or tunnel which discloses the vein, lode or deposit located at a vertical depth of at least ten feet below the natural surface of the ground and which constitutes at least one hundred and fifty cubic feet of excavation, shall be deemed the equivalent of such shaft, and, provided also, that, where the vein, lode or deposit located is disclosed at a less vertical depth than ten feet, any deficiency in the depth of the discovery shaft, cut or tunnel may be compensated for by any horizontal extension of such working, or by any excavation done elsewhere upon the claim, equaling, in cubical contents, the cubical extent of such deficiency; but in every case at least seventy-five cubic feet of excavation shall be made at the point of discovery. Rev. Pol. Code 1895, §§ 3610, 3611; Amended 1901, p. 140; 1907, p. 18; Rev. Code (1907), § 2283.

Held generally to be consistent with the federal laws: Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1039; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.

Statute referred to in text: §§ 352, 442.

Purpose of location certificate: § 379.

Rules of construction applied: § 381. See, also, § 351.

Place and manner of posting: § 356.

**Record of certificate of location.**

§ 2. Within sixty days after posting the notice of location and for the purpose of constituting constructive notice of the location, the locator shall record his location in the office of the county clerk of the county in which such mining claim is situated. Such record shall consist of a certificate of location containing:

1. The name of the lode or claim.

2. The name of the locator or locators, if there be more than one.

3. The date of location, and such description of said claim, with reference to some natural object or permanent monument, as will identify the claim.

4. In the case of a lode claim, the direction and distance claimed along the course of the vein each way from the discovery shaft, cut or tunnel, with the width claimed on each side of the center of the vein.

5. In the case of a placer claim, the dimensions or area of the claim, and the location thereon on the discovery shaft, cut or tunnel.

6. The locator and claimant, at his option, may also set forth, in such certificate of location, a description of the discovery work, the corner monuments and the markings thereon, and any other facts showing a compliance with the provisions of this law. Such certificate of location must be verified, before some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one, or by authorized agent. In the case of a corporation, the verification may be made by an officer thereof, or by an authorized agent. When the verification is made by an agent, the fact of the agency shall be stated in the affidavit. A certificate of location so verified, or a certified copy thereof, is *prima facie* evidence of all facts properly recited therein. Rev. Pol. Code 1895, § 3612; Amended 1901, p. 140; 1907, p. 18; Rev. Code (1907), § 2284.

Held to be consistent with and supplementary to federal legislation. Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1039; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.

Object of requirement as to development work: § 344.
Relationship of the discovery to the discovery shaft: § 345.
Extent of development work: § 346.
Section referred to in text: §§ 374, 455.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the federal law: § 373.
What is sufficient marking under the federal law in case of placers: § 454.
Perpetuation of monuments: § 375.
Verification of certificates: § 385, and § 251, where the validity of the requirement is questioned.
Time and place of record and effect of failure to record within time limited: §§ 389–390.

Millsites.

§ 3. Millsite claims may be located and recorded in the same manner as other claims, except that no discovery or discovery work is required. Where a millsite claim is appurtenant to a mining claim, the certificate of location on such millsite claim shall describe, by appropriate reference, the mining claim to which it is appurtenant. Laws 1907, p. 18; Rev. Code (1907), § 2285.

This statute held to be mandatory and substantial compliance with its provisions necessary. Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.
Held to be consistent with federal laws. Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037, 1039; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.

Section referred to in text: §§ 380, 459.
Purpose of location certificate: § 379.
Rules of construction: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.

**Validating locations heretofore made.**

§ 4. All mining locations made and recorded under the laws of this state, heretofore in force, that in any respect have failed to conform to the requirements of such laws, shall nevertheless, in the absence of the rights of third persons accruing prior to the passage of this act, be valid if the making and recording of such locations conform to the requirements of this act. Rev. Pol. Code 1895, § 3613; Laws 1907, p. 18; Rev. Code (1907), § 2292.

Held to be reasonable and not in conflict with federal laws. Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.
The record as evidence: § 392.

**Annual work, proof of.**

§ 5. The owner of a lode or placer claim who performs or causes to be performed the annual work or makes the improvements required by the laws of the United States in order to prevent the forfeiture of the claim, may, within twenty days after the annual work, file in the office of the county clerk of the county in which such claim is situated, an affidavit of his own, or an affidavit of the person who performed such work or made the improvements, showing: First, the name of the mining claim and where situated; second, the number of days' work done, and the character and value of the improvements placed thereon; third, the date of performing such work and of making the improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvements, by whom paid, when the same was not done by the owner.

Such affidavits, or a certified copy thereof, are *prima facie* evidence of the facts therein stated. Rev. Pol. Code 1895, § 3614.

Through inadvertence, this section was not carried into the Revised Codes of 1907. The attorney-general of Montana writes that the section is still in full force and effect.
Proof of annual labor: § 636.
Can preliminary work required by state laws as an act of location be credited on the first year's work? See § 636.
Annual labor, generally, discussed in text: §§ 623–638.

**Relocation of abandoned lode or placer.**

§ 6. The locator of an abandoned or forfeited mining claim may adopt as his discovery any shaft or other working, existing upon such claim at the date of the relocation, in which the vein, lode or deposit is disclosed, but in such shaft or other working, he shall perform the

same discovery work as is required in the case of an original location. Rev. Pol. Code 1895, § 3615; Amended 1907, p. 18; Rev. Code (1907), § 2286.

**Rights of relocator.**

§ 7. The rights of a relocator of any abandoned or forfeited mining claim, hereafter relocated, shall date from the posting of his notice of location thereon, and, while he is duly performing the acts required by law to perfect his location, his rights shall not be affected by any re-entry or resumption of work by the former locator or claimant. Amended 1907, p. 18; Rev. Code (1907), § 2287.

**Amended location.**

§ 8. A locator or claimant may, at any time, amend his location and make any change in the boundaries which does not involve a change in the point of discovery as shown by the discovery shaft by marking the location as amended upon the ground, and filing an amended certificate of location conforming to the requirements of an original certificate of location. A defect in a recorded certificate of location may be cured by filing an amended certificate. Amended 1907, p. 18; Rev. Code (1907), § 2288.

**Relocation by owner.**

§ 9. A locator or claimant may, at any time, relocate his own claim for any purpose, except to avoid the performance of annual labor thereof, and, by such relocation, may change the boundaries of his claim, or the point of discovery, or both, but such relocation must comply, in all respects, with the requirements of this law as to an original location. Amended 1907, p. 18; Rev. Code (1907), § 2289.

**Amendment or relocation not a waiver of acquired rights.**

§ 10. Where a locator or claimant amends or relocates his own claim, such amendment or relocation shall not be construed as a waiver of any right or title acquired by him by virtue of the previous location or record thereof, except as to such portions of the previous location as may be omitted from the boundaries of the claim as amended or relocated. As to the portion of ground included both in the original location and the location as amended or relocated, he may rely either upon the original location or the location as amended or relocated, or upon both. Provided, that nothing herein contained shall be construed as permitting the locator or claimant to hold a tract which does not include a valid discovery. Amended 1907, p. 18; Rev. Code (1907), § 2290.

**Rights of third persons not affected.**

§ 11. No amendment or relocation of a mining claim by the locator or claimant thereof shall interfere with the right of any third person

existing at the time of such amendment or relocation. Amended 1907, p. 18; Rev. Code (1907), § 2291.

**Defective locations good against persons with notice.**

§ 12. The period of time, prescribed by this law for the performance of any act, shall not be deemed mandatory where the act is performed before the rights of third persons have intervened, and no defect in the posted notice or recorded certificate shall be deemed material, except as against one who has located the same ground, or some portion thereof, in good faith and without notice. Notice to an agent, who makes a location in behalf of another, shall be deemed notice to his principal, and notice to one of several co-claimants shall be deemed notice to all. Amended 1907, p. 18; Rev. Code (1907), § 2293.

**Effect of patent.**

§ 13. The issuance of a United States patent for a mining claim shall be deemed conclusive that the requirements of the laws of this state, relative to the location and record of such mining claim, have been duly complied with: *provided, however,* that where questions of priority are involved the date of the location shall be an issuable fact where it is claimed to have been prior to the date of the record of the location. Amended 1907, p. 18; Rev. Code (1907), § 2294.

Section referred to in text: § 408.
Circumstances under which relocation may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent of original locator: § 407.
Right of second locator to improvements made by first: § 409.

**Official survey, field-notes, and certificate as part of declaratory statement.**

§ 14. Where a locator or owner of a mining claim has the boundaries and corners of his claim established by a United States deputy mineral surveyor, and his claim connected with a corner of the public or minor surveys, or an established initial point, and incorporates into the declaratory statement the field-notes of such survey, and attaches to and files with such declaratory statement, a certificate by the surveyor setting forth: First, that said survey was actually made by him, giving the date thereof; second, the name of the claim surveyed and the locators thereof; third, that the description incorporated in the declaratory statement is sufficient to identify the claim.

Such survey and certificate becomes a part of the declaratory statement, and such declaratory statement is *prima facie* evidence of the facts therein contained. The provisions of this chapter apply only

to locations made after this code takes effect. Rev. Pol. Code 1895, § 3616.

Through inadvertence, this section was not carried into the Revised Codes of 1907. The attorney-general of Montana writes that the section is still in full force and effect.

**Amended declaratory statement and relocation.**

§ 15. If at any time the locator of any mining claim heretofore or hereafter located, or his successors or assigns, shall apprehend that his original declaratory statement was defective or erroneous, or that the requirements of law had not been complied with, or shall be desirous of changing his boundaries, or taking in any part of an overlapping claim which has been abandoned, or in case his original declaratory statement was filed prior to the passage of this law and he shall be desirous of securing the benefit of this act, such locator, or his successors or assigns, may file an additional or amended declaratory statement subject to the provisions of this act; provided, that such relocation or filing of an amended or additional declaratory statement shall not interfere with the existing right of others at the time of such relocation or filing of the amended or additional declaratory statement, and no such relocation or amended or additional declaratory statement, or other record thereof, shall preclude the claimant or claimants from proving any such title as he or they may have held under the previous location and notice thereof. Laws 1901, p. 56, § 1; Rev. Code (1907), § 2295.

Objects and functions of amended certificate: § 398.

**Previous amended declaratory statements and relocations to have benefit of this act.**

§ 16. Any amended or additional declaratory statement which may have heretofore been filed by a locator, or his successors or assigns, shall have the same force and effect and be subject to the same terms and conditions as though the same had been filed under the provisions of section one of this act. Laws 1901, p. 57, § 2; Rev. Code (1907), § 2296.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that the owner of a mining claim shall have right of way over adjoining property and prescribing procedure therefor. Rev. Pol. Code 1895, §§ 3630–3641; Rev. Code (1907), §§ 2297–2308.

See text, §§ 530, 531. See Glass v. Basin M. Co., 55 Pac. 1047.

2. Mining claims properly located not to be affected by townsite patents for unincorporated towns. Rev. Pol. Code 1895, § 5112; Rev. Code (1907), § 3526.

3. Regulations governing the taxation of mines and exemptions of property from execution. Rev. Pol. Code 1895, §§ 3672, 3760–3768; Rev. Code Civ. Proc. 1895, § 1222, subd. 5; Rev. Code (1907), §§ 2500, 2501, 2563–2571, 6825.

4. Provisions regulating mining partnerships. Rev. Civ. Code 1895, §§ 3350–3359; Rev. Code (1907), §§ 5535–5544.

5. Provisions defining fixtures and determining what things are deemed affixed to mining claims. Rev. Civ. Code 1895, § 1077; Rev. Civ. Code 1907, § 4428.

6. Customs and usages of particular districts as evidence in actions to determine conflicting claims to mining property. Rev. Code Civ. Proc. 1895, § 1321; Rev. Code (1907), § 6881.

Local district regulations as evidence: See text, § 272.

7. Providing that possession is immaterial in adverse suits. Rev. Code (1895), § 1322; Rev. Code (1907), § 6882.

8. Provisions regulating the summary sales of mines and mining interests of decedents. Rev. Code Civ. Proc. 1895, §§ 2660–2664; Rev. Code (1907), §§ 7556–7560.

9. Provisions creating the office of inspector of mines and defining the powers and duties of the inspector, and governing safety apparatus in mines. Rev. Pol. Code 1895, §§ 580–590; Rev. Pol. Code 1895, §§ 3650–3654. As amended by act of March 4, 1897, Laws 1897, p. 109; Laws 1903, ch. 98; Rev. Code (1907), §§ 1711–1726; Amended Laws 1909, p. 94, §§ 1711, 1712; Amended Laws 1911, p. 128.

10. Provisions regulating the working of coal mines. Laws 1911, p. 261.

11. Provisions governing the employment of children in mines. Rev. Pen. Code 1895, § 474; Act February 15, 1905, §§ 1–3; Rev. Code (1907), § 8349; Act March 5, 1907, §§ 1–6; Rev. Code (1907), §§ 1746–1754.

12. Provisions regulating the sale and storage of explosives in mines and cities. Rev. Pen. Code 1895, §§ 707–710; Rev. Code (1907), §§ 8545–8548.

13. Provisions regulating punishment for malicious mischief in destroying or tearing down notices, stakes or monuments. Rev. Pen. Code 1895, § 1062; Rev. Code (1907), § 8759.

14. Providing punishment for taking water from mining ditches or flumes or destroying or injuring dams used for mining purposes. Rev. Pen. Code 1895, §§ 1034–1058; Rev. Code (1907), §§ 8739, 8755.

15. Regulating the hours of labor of hoisting engineers, underground miners, smelter-men and other employees in mines and reduction works, and fixing the penalties for violation thereof. Approved

Feb. 19, 1897, Laws 1897, p. 67; Laws 1901, chapters 62, 63; Laws 1903, ch. 53; Laws 1907, ch. 108; Rev. Code (1907), §§ 1731–1740; Amended Laws 1911, p. 25.

16. An act to further protect underground miners. Approved March 1, 1897, Laws 1897, p. 66; Laws 1899, pp. 149, 150; Laws 1903, chapters 60, 82; Rev. Code (1907), §§ 8535–8543.

17. An act relating to the casing in of cages in mines, amending section 705 of the Revised Penal Code of 1895. Approved March 1, 1897, Laws 1897, p. 245; Rev. Code (1907), § 8536.

18. Regulating the right of a party to an action concerning a mining claim to an order for inspection and survey. Rev. Code Civ. Proc., §§ 1314–1317; Rev. Code (1907), §§ 6874–6876.

19. Providing for the issuance of stock in payment for mines. Rev. Code (1907), § 3824.

20. Authorizing the issuance of certificates of stock to bearer by mining corporations. Laws 1897, p. 69; Rev. Code (1907), § 3860.

21. Enlarging the powers of mining corporations over property of such corporations, and protecting dissenting stockholders. Laws 1899, p. 105; Rev. Code (1907), §§ 4403–4412.

22. Providing for the consolidation of mining corporations, sale of entire corporate property, dissolution, and protection of dissenting stockholders. Law 1905, p. 103; Rev. Code (1907), §§ 3896–3901.

23. Establishing a standard of measurement for water and defining the equivalent of a miner's inch. Laws 1899, p. 117; Rev. Code (1907), § 4855.

24. Regulating the exercise of the right of eminent domain in connection with the development and operation of mines. Laws 1899, p. 125, subds. 4, 5; Laws 1907, ch. 4; Rev. Code (1907), § 7331.

25. Repealing section 494 of the Code of Civil Procedure, which prescribes a limitation of one year for actions for the recovery of placer mining claims. Laws 1899, p. 126.

26. Relating to exposed shafts, providing a penalty for failure to close and protect the same. (Amendatory of section 704 of the Penal Code.) Laws 1899, p. 138; Rev. Code (1907), § 8535.

27. An act to provide for the employment of a check weighman at coal mines. Approved Feb. 19, 1901, Laws 1901, p. 65.

28. An act prohibiting owners of coal mines from dumping coal slack or coal screenings into streams containing fish or water used for domestic purposes or irrigation. In effect Nov. 1, 1901, Laws 1901, p. 165; Laws 1903, ch. 6; Rev. Code (1907), §§ 8557, 8558.

29. Establishing a school of mines. Rev. Pol. Code 1895, §§ 1570–1602; Rev. Code (1907), §§ 689–729.

30. Providing for mechanics' liens for miners and making miners' wages preferred claim. Rev. Code Civ. Proc. 1895, §§ 2130, 2150, 2152; Rev. Code (1907), §§ 7290, 7302, 7304.

31. Providing a penalty for violating the provisions concerning regulation of coal mines and inspection of mines. Rev. Pen. Code 1895, §§ 718, 722; Rev. Code (1907), §§ 8559, 8563.

32. Making the "salting" of mines, changing or interfering with samples of ore or bullion purchased for assaying, or altering the certificate of sampling or assaying, or making false sample or assay, a felony. Rev. Pen. Code 1895, §§ 942–944; Rev. Code (1907), §§ 8692–8694; Laws 1909, p. 60.

33. Providing that a cotenant or joint tenant of mining property may sue cotenant and may mine the ground in a miner-like manner, without the participation of the other cotenants or joint tenants. Laws 1899, p. 124 (amending § 592, Code Civ. Proc.); Rev. Code (1907), § 6499.

Referred to in text: § 790.

34. Providing that the statute of limitations in case of underground trespass upon mining property shall not begin to run until discovery of the trespass. Rev. Code Civ. Proc. 1895, § 524; Laws 1903, ch. 128; Rev. Code (1907), § 6449.

35. Defining occupant of mining claim. Rev. Code (1895), § 2081; Rev. Code (1907), § 7270.

36. Prohibiting sale of intoxicating liquors within five miles of mine. Laws 1907, ch. 65; Rev. Code (1907), § 8555.

37. Creating board of examiners to examine applicants for position of coal mine inspector. Laws 1909, p. 75.

38. Providing for accident insurance for coal miners and coal washers. Laws 1909, p. 81.

39. Creating board of examiners to examine applicants for position of mine foreman, mine examiner or fire boss, for coal mines. Laws 1909, p. 87.

40. Providing for formation of corporations for mining purposes. Code 1895, §§ 393, 411, 412; Rev. Codes 1907, §§ 3808, 3825, 3826; Amended Laws 1909, p. 146.

41. Providing for selection of umpire assayers to sample disputed ores. Laws 1909, p. 162.

42. Providing for proper ventilation and protection of quartz mines. Laws 1911, p. 135.

## NEVADA.

I. Acts Regulating the Location and Development of Lode, Placer, Tunnel and Millsite Claims.

II. Act Regulating the Disposition of State Mineral Lands.

III. Reference to Miscellaneous Legislation on Mining Subjects.

### I. ACTS REGULATING THE LOCATION AND DEVELOPMENT OF LODE, PLACER, TUNNEL AND MILLSITE CLAIMS.

**Lode claim—Who may locate—Posting notice.**

§ 1. Any person, a citizen of the United States or one who has declared his intention to become such, who discovers a vein or lode, may locate a claim upon such vein or lode by defining the boundaries of the claim in the manner hereinafter described, and by posting a notice of such location at the time and point of discovery, which notice must be posted upon one of the several monuments prescribed in section 2 of this act, and such notice must contain:

First—The name of the lode or claim;

Second—The name of the locator or locators;

Third—The date of location;

Fourth—The number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode as near as may be. Comp. Laws 1900, § 208; Amended 1907, p. 418; Rev. Laws 1912, § 2422.

Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.
What constitutes discovery: § 336.

**Discovery shaft and equivalent—Marking boundaries.**

§ 2. The locator of the lode mining claim must sink a discovery shaft upon the claim located four feet by six feet to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show by such work a lode deposit of mineral in place; a cut or crosscut or tunnel which cuts the lode at a depth of ten feet or an open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep, is equivalent to a discovery shaft. The locator must define the boundaries of his claim by removing the top of a tree (having a diameter of not less than four inches) not less than three feet above the ground, and blazing and marking the same, or by a rock in place, capping such rock with smaller stones, such rock and stones to have

a height of not less than three feet, or by setting a post or stone one at each corner and one at the center of each side-line. When a post is used, it must be at least four inches in diameter by four and one-half feet in length set one foot in the ground. When it is practically impossible, on account of bedrock or precipitous ground, to sink such posts, they may be placed in a mound of earth or stones, or where the proper placing of such posts or other monuments is impracticable or dangerous to life or limb, it shall be lawful to place such posts or monuments at the nearest point properly marked to designate its right place. When a stone is used (not a rock in place) it must be not less than six inches in diameter and eighteen inches in length set two-thirds of its length in the top of a mound of earth or stone, four feet in diameter and two and one-half feet in height. All trees, posts or rocks used as monuments, when not four feet in diameter at the base, shall be surrounded by a mound of earth or stone four feet in diameter by two feet in height, which trees, posts, stones or rock monuments must be so marked as to designate the corners of the claim located; provided, however, that the locator of a mining claim shall within twenty days from the date of posting the notice of location define the boundaries of said claim by placing at each corner and at the center of each side-line one of the hereinbefore described monuments, and shall within ninety days of the date of posting said location notice perform the location work hereinbefore prescribed. Comp. Laws 1900, § 209; Amended 1901, p. 97; 1907, p. 418; Rev. Laws 1912, § 2423.

Section referred to in text: §§ 343, 374.
Object of requirement as to development work: § 344.
Relationship of discovery to discovery shaft: § 345.
Extent of development work: § 346.
Form and size of the claim: § 361.
Necessity for, and object of, marking: § 371.
Time allowed for marking: § 372.
What is sufficient marking under the federal law: § 373.
Perpetuation of monuments: § 375.
Validity of this legislation upheld. Sissons v. Sommers, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829.

**Location notice—Record—Records made prior to passage of act.**

§ 3. Any locator or locators of a mining claim, after having established the boundaries of said claims, and after having complied with the provisions of this act with reference to the establishment of such boundaries, may file with the district mining recorder a notice of location, setting forth the name given to the lode or vein, the number of linear feet claimed in length along the course of the vein, the date of the location, the date on which the boundaries of the claim were

completed, and the name of the locator or locators. Should any claim be located in any section or territory where no district has been as yet formed, or where there is no district recorder, the locator or locators of such claims may file with the county recorder, notice of location as set forth above, and said notice of location will be *prima facie* evidence in all courts of justice of the first location of said lode or vein. Within ninety days of the date of posting the location notice upon the claim the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated by location certificate which must contain:

First—The name of the lode or vein;

Second—The name of the locator or locators;

Third—The date of the location and such description of the location of said claim, with reference to some natural object or permanent monument, as will identify the claim;

Fourth—The number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be;

Fifth—The dimensions and locations of the discovery shaft or its equivalent, sunk upon the claim;

Sixth—The location and description of each corner, with the markings thereon.

Any record of the location of a lode mining claim which shall not contain all the requirements named in this section shall be void. All records of lode or placer mining claims, millsites or tunnel rights heretofore made by any recorder of any mining district or any county recorder are hereby declared to be valid and to have the same force and effect as records made in pursuance of the provisions of this act. And any such record, or a copy thereof duly verified by a mining recorder or duly certified by a county recorder, shall be *prima facie* evidence of the facts therein stated. Comp. Laws 1900, § 210; Amended 1907, p. 420; Rev. Laws 1912, § 2424.

Section referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record and failure to record within time limited: §§ 389, 390.

**Extralateral rights—Intralimital rights.**

§ 4. The location or record of any vein or lode claim shall be construed to include all surface ground within the surface lines thereof,

and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended downward vertically, with all parts of such lodes or veins as continue to dip beyond the side-lines of the claim, but shall not include any portion of such lodes, veins, or ledges beyond the end-lines on the claim, or the end-lines continued, whether by dip or otherwise, or beyond the side-lines in any other manner than by the dip of the lode. Comp. Laws 1900, § 211; Rev. Laws, § 2425.

Validity and effect of such legislation questioned: § 251.

**Lode not to be pursued on strike beyond end-lines.**

§ 5. If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course where it is intersected by the exterior lines. Comp. Laws 1900, § 212; Rev. Laws 1912, § 2426.

See note to preceding section.

**Amended location certificate—Change of boundaries.**

§ 6. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing; or shall be desirous of changing his surface boundaries or of taking in any part of an overlapping claim which has been abandoned; or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such titles as he or they may have held under previous location. Comp. Laws 1900, § 213; Rev. Laws 1912, § 2427.

Objects and functions of amended location certificates discussed in text: § 398.

Circumstances justifying change of boundaries: § 396.

Privilege of changing boundaries exists in absence of intervening rights, independent of state legislation: § 397.

**Relocation of abandoned claims.**

§ 7. The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, in which case the record must give the depth and dimensions of the original discovery shaft at the date of such relocation

and erect new or adopt the old boundaries, renewing the posts or monuments if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken the record may state that the whole or any part of the new location is located as abandoned property. If it is not known to the relocator that his location is on an abandoned claim, then the provisions of this section do not apply. Comp. Laws 1900, § 214; Rev. Laws 1912, § 2428.

Circumstances under which relocation may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Manner of perfecting relocations: § 408.
Right of second locator to improvements made by first: § 409.

**Location certificate—Description by reference to surveyed field-notes.**

§ 8. Where a locator, or his assigns, has the boundaries and corners of his claim established by a United States deputy mineral surveyor, or a licensed surveyor of this state, and his claim connected with a corner of the public or miner surveys of an established initial point, and incorporates into the record of the claim the field-notes of such survey, and attaches to and files with such location certificate a certificate of the surveyor, setting forth: First, that said survey was actually made by him, giving the date thereof; second, the name of the claim surveyed and the location thereof; third, that the description incorporated in the declaratory statement is sufficient to identify. Such survey and certificate becomes a part of the record, and such record is *prima facie* evidence of the facts therein contained. Comp. Laws 1900, § 215; Rev. Laws 1912, § 2429.

**Annual labor—Amount required—Value of a day's labor.**

§ 9. The amount of work done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, to wit: One hundred dollars annually. In estimating the worth of labor required to be performed upon any mining claim, to hold the same under the laws of the United States, the value of a day's labor is hereby fixed at the sum of four dollars; provided, however, that in the sense of this statute eight hours of labor actually performed upon the mining claim shall constitute a day's labor. Comp. Laws 1900, § 216; Rev. Laws 1912, § 2430.

For discussion of the subject of annual labor, see §§ 623–638.
Requirement as to annual labor imperative: § 624.
By whom labor must be performed: § 633.

Circumstances under which performance of annual labor is excused: § 624.
Value of labor and improvements, how estimated: § 635.
When obligation to perform annual labor ceases: § 637.
Validity of legislation fixing the value of a day's labor questioned: § 624.

**Proof of annual labor.**

§ 10. Within sixty days after the performance of labor, or making of improvements, required by law to be annually performed or made upon any mining claim, the person in whose behalf such labor was performed, or improvements made, or some one in his behalf, shall make and have recorded by the mining district recorder or the county recorder in books kept for that purpose in the mining district or county in which such mining claim is situated, an affidavit setting forth the amount of money expended, or value of labor or improvements made, or both, the character of expenditures or labor, or improvements, a description of the claim or part of the claim affected by such expenditures, or labor or improvements, for what year, and the name of the owner or claimant of said claim at whose expense the same was made or performed. Such affidavit or a copy thereof, duly certified by the county recorder, shall be *prima facie* evidence of the performance of such labor or the making of such improvements, or both. Comp. Laws 1900, § 217; Rev. Laws 1912, § 2431.

See note to preceding section.
Proof of annual labor discussed: § 636.

**Forfeiture to co-owners.**

§ 11. Whenever a co-owner or co-owners shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section 2324, Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded by the mining district recorder or the county recorder, in books kept for that purpose, in the mining district or county in which the mining claim is situated; within ninety days after the giving of such notice, or if such notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice an affidavit of the printer or his foreman or principal clerk of such paper, stating the date of the first, last, and each insertion of such notice therein, and when and where the newspaper was published during that time, and the name of such newspaper. Such affidavit and notice shall be recorded as aforesaid within one hundred and eight [eighty] days after the first publication thereof. The original of such notice and affidavits, or a duly certified copy of the record

thereof, shall be evidence that the delinquent mentioned in section 2324 has failed or refused to contribute his proportion of the expenditure required by that section and of the service or publication of said notice; provided, the writing or affidavit hereinafter provided for is not of record. If such delinquent shall, within the ninety days required by section 2324 aforesaid, contribute to his co-owner or co-owners his proportion of such expenditures, such co-owner or co-owners shall sign and deliver to the delinquent or delinquents a writing, stating that the delinquent or delinquents, by name, has within the time required by section 2324 of the Revised Statutes of the United States, contributed his share for the year ——, upon the —— mine, and further stating therein the district, county, and state where the same is situate, and the book and page where the location notice is recorded; such writing shall be recorded in the office of the county recorder of said county. If such co-owner or co-owners shall fail to sign and deliver such writing to the delinquent or delinquents within twenty days after such contribution, the co-owner or co-owners so failing as aforesaid shall be liable to a penalty of one hundred dollars, to be recovered by any person for the use of the delinquent or delinquents in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within said twenty days, then the delinquent, with two disinterested persons having personal knowledge of such contribution, may make affidavit setting forth in what manner, the amount of, to whom, and upon what mine, such contribution was made. Such affidavit, or a record thereof in the office of the county recorder of the county in which said mine is situate, shall be *prima facie* evidence of such contribution. Comp. Laws 1900, § 218; Rev. Laws 1912, § 2432.

Validity of such legislation questioned: §§ 251, 646.
Forfeiture to co-owners discussed: § 646.

**Notice of location claiming more than one location is void.**

§ 12. No notice of location of a lode claim shall claim more than one location, whether the location be made by one or several persons. And if such notice purport to claim more than one location it shall be absolutely void, except as to the first location therein described. And if they are described together, or so that it cannot be told which location is first described, the notice of location shall be void as to all. Comp. Laws 1900, § 219; Rev. Laws 1912, § 2433.

The location certificate and its contents discussed: §§ 379–385.

**Placer claims, how located—Posting notices—Marking boundaries.**

§ 13. The location of a placer claim shall be made in the following manner: By posting thereon, upon a tree, rock in place, stone, post, or monument, a notice of location, containing the name of the claim,

name of locator or locators, date of location, and number of feet or acres claimed, and by marking the boundaries and the location point in the same manner and by the same means as required by the laws of this state for marking the boundaries of lode claim locations; provided, that where the United States survey has been extended over the land embraced in the location, the claim may be taken by legal subdivisions, and, except the marking of the location point as hereinbefore prescribed, no other markings than those of said survey shall be required. As amended, Stats. 1899, p. 94; Comp. Laws 1900, § 220; Rev. Laws 1912, § 2434.

Requirements for locating placers in absence of state legislation: §§ 432, 454.
Same where state legislation exists: § 433.
Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.

**Placers—Location certificate—Record.**

§ 14. Within ninety days after the posting of the notice of location of a placer claim, the locator shall perform not less than twenty dollars' worth of labor upon the claim for the development thereof, and shall have recorded by the mining district recorder and the county recorder of the district and county in which the claim is situated a certificate which shall state the name of the claim, designating it as a placer claim, name of locator or locators, date of location, number of feet or acres claimed, a description of the claim with regard to some natural object or permanent monument, so as to identify the claim, and the kind and the amount of work done by him as herein required, and the place on the claim where said work was done. This certificate, or the record thereof, or a duly certified copy of said record, shall be *prima facie* evidence of the recitals therein. But if such certificate do not state all the facts herein required to be stated, it shall be void. As amended, Stats. 1899, p. 94; Comp. Laws 1900, § 221; Rev. Laws 1912, § 2435.

Referred to in text: §§ 443, 459.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with law as to contents of certificate: § 384.

**Millsite may be located.**

§ 15. The proprietor of a vein or lode claim or mine, or the owner of a quartz-mill or reduction works, may locate five acres of nonmineral land as a millsite. Comp. Laws 1900, § 222; Rev. Laws 1912, § 2436.

Law relating to millsites generally: § 519.
Different classes of millsites: § 520.
Location of millsite with reference to lode: § 522.
Nature of use required in case of location by lode proprietor: § 523.

Millsites used for quartz-mill or reduction works disconnected with lode ownership: § 524.
Right to millsite, how initiated: § 521.
Manner of acquiring patent to: § 708.

**Millsite, how located—Posting notice—Marking boundaries.**

§ 16. The locator of a millsite location shall locate his claim by posting a notice of location thereon, which must contain: First, the name of the locator or locators; second, the name of the vein or lode claim, or mine, of which he is the proprietor, or the name of the quartz-mill or reduction works of which he is the owner; third, the date of the location; fourth, the number of feet or acres claimed; fifth, a description of the claim by such reference to a natural object or permanent monument as shall identify the claim or millsite. And by marking the boundaries of his claim in the same manner as provided in this act for the marking of the boundaries of a placer mining claim, so far as the same may be applicable thereto. Comp. Laws 1900, § 223; Rev. Laws 1912, § 2437.

See note to preceding section.

**Millsite—Location notice and record.**

§ 17. The locator of a millsite claim or location shall within thirty days from the date of his location record his location with the mining district recorder and the county recorder of the district or county in which such location is situated, by a location certificate which must be similar in all respects to the one posted on the location. Comp. Laws 1900, § 224; Rev. Laws 1912, § 2438.

See notes to § 222, Comp. Laws, *supra.*

**Millsite—Notice of location, when void.**

§ 18. Any record of a millsite location which shall not contain the name of the locator or locators, the name of the vein or lode claim or mine of which the locator is the proprietor, or the name of the quartz-mill or reduction works of which the locator is the owner, the number of feet or acres claimed, and such description as shall identify the claim with reasonable certainty, shall be void. Comp. Laws 1900, § 225; Rev. Laws 1912, § 2439.

See notes to § 222, Comp. Laws 1900, *supra.*

**Tunnel right or location, how located—Posting.**

§ 19. The locator of a tunnel right or location shall locate his tunnel right or location by posting a notice of location at the face or point of commencement of the tunnel which must contain: First, the name of the locator or locators; second, the date of the location; third, the proposed course or direction of the tunnel; fourth, the height and width thereof; fifth, the position and character of the boundary monu-

ments; sixth, a description of the tunnel by such reference to a natural object or permanent monument as shall identify the claim or tunnel right. Comp. Laws 1900, § 226; Rev. Laws 1912, § 2440.

"Line" of tunnel defined: § 473.
"Face" of tunnel defined: § 474.

**Tunnel boundary lines, how established.**

§ 20. The boundary lines of the tunnel shall be established by stakes or monuments placed along such lines at an interval of not more than three hundred feet from the face or point of commencement of the tunnel to the terminus of three thousand feet therefrom. The stakes or monuments shall be of the same size and character as those provided for lode or placer claims in this act. Comp. Laws 1900, § 227; Rev. Laws 1912, § 2441.

See note to preceding section.
Marking of the tunnel location on the ground: § 475.

**Tunnel location—Record.**

§ 21. The locator of a tunnel right or location shall within sixty days from the date of the location record his location with the mining district recorder and the county recorder of the county or district in which such location is situated, which must be similar in all respects to the one posted on the location. Any record of a tunnel right or location which shall not contain all the requirements named in this section shall be void. Comp. Laws 1900, § 228; Rev. Laws 1912, § 2442.

See notes to two preceding sections.
Acts to be performed in acquiring tunnel rights: §§ 472, 475.

**Blind lodes discovered in tunnel, how located.**

§ 22. All blind lodes, or veins or lodes not previously known to exist, discovered in a tunnel run for the development of a vein or lode, or for the discovery of mines, and within three thousand feet from the face of such tunnel, shall be located upon the surface and held in like manner as other lode claims under the provisions of this act. Comp. Laws 1900, § 229; Rev. Laws 1912, § 2443.

**Provisions of act, to what claims applicable.**

§ 23. The provisions of this act shall be construed as equally applicable to all classes of locations except where the requirement as to any one class is manifestly inapplicable to any other class or classes. Comp. Laws 1900, § 230; Rev. Laws 1912, § 2444.

**Certificates of location, form of.**

§ 24. Certificates of location and of labor and improvements necessary to hold claims need not be sworn to, and are not required to be in any specified form, nor to state facts in any specific order; but must

truly state the required facts. Stats. 1899, p. 95, § 24; Comp. Laws 1900, § 231; Rev. Laws 1912, § 2445.

This section evidently refers to location work. By a preceding section affidavits of annual labor are required.

**District recording not required in certain cases.**

§ 25. Where there is no mining district, or where a district having once existed, the residence of the officers within the district and their places of business within the district where the books are kept are not publicly known, district recording shall not be required of the locator or claim owner. But recording shall be required in the office of the county recorder in all cases; as well where there is a district recorder as where there is none. Stats. 1899, p. 95, § 25; Comp. Laws 1900, § 232; Rev. Laws 1912, § 2446.

**Duplicate notices of location filed with mining recorder.**

§ 26. It shall be the duty of each and every mining recorder of the several mining districts of the state to require all persons locating and recording a mining claim to make a duplicate copy of each and every mining notice, which copy the said mining recorder shall carefully compare with the original, and mark "duplicate" on its face or margin, and he shall immediately deposit with or transmit the same to the county recorders of the respective counties in which said mining district may be located. Comp. Laws 1900, § 244; Rev. Laws 1912, § 2469.

**Fees for recording notices of location—No district recorder.**

§ 27. The county recorders of the several counties shall receive for their services for recording each of said duplicate notices mentioned in section 2 of this act, the sum of one dollar; provided, that in case the location is made outside of an organized mining district or in the absence of a mining recorder in any organized district, then the person or persons making such location shall within ninety days after making such location transmit a duplicate copy of such notice to the recorder of the county in which the location is made and the recorder shall record the same for a fee of one dollar. Comp. Laws 1900, § 247; Rev. Laws 1912, § 2472.

**Recorder to give receipt for notices filed.**

§ 28. Whenever the locator of a mining claim shall file his certificate of location in accordance with the law and pay the prescribed fees therefor, it shall be the duty of the mining district recorder, and of the county recorder, with whom said certificate is filed, forthwith to give such locator, or his agent, a receipt therefor; said receipt shall contain name of the claim given in notice filed and date of location

thereof, stating the day and hour such certificate of location was filed. Stats. 1907, p. 193; Rev. Laws 1912, § 2451.

**District mining recorder's seal.**

§ 29. Each district mining recorder shall provide a seal on which shall be engraved the name of the mining district, the county and state with which said seal he shall authenticate all of his official acts, which seal, together with his official documents and books, shall not be liable to be seized on execution. Stats. 1907, p. 193; Rev. Laws 1912, § 2453.

## II. ACT REGULATING THE DISPOSITION OF STATE MINERAL LANDS.

**State disclaims all title to lands containing mineral—How such lands are to be located—Mining a public use.**

The several grants made by the United States to the state of Nevada reserved the mineral lands. Sales of such lands made by the state were made subject to such reservations. Any citizen of the United States or person having declared his intention to become such, may enter upon any mineral lands in this state, notwithstanding the state's selection, and explore for gold, silver, copper, lead, cinnabar, or other valuable mineral, and upon the discovery of such valuable mineral may work and mine the same in pursuance of the local rules and regulations of the miners and the laws of the United States; provided, that after a person who has purchased land from the state has made valuable improvements thereon, such improvements shall not be taken or injured without full compensation. But such improvement may be condemned for the uses and purposes of mining in like manner as private property is by law condemned and taken for public use. Mining for gold, silver, copper, lead, cinnabar, and other valuable mineral, is the paramount interest of this state, and is hereby declared to be a public use. Stats. 1887, pp. 102, 103, § 1; Comp. Laws 1900, § 281; Rev. Laws 1912, § 2456.

See discussion of this statute in Stanley v. Mineral Union (Nev.), 63 Pac. 59.

See similar act in California and note thereto: *Ante*, p. 2452.

See In re State of Montana, 22 L. D. 474.

Mining as a public use in Nevada: § 256.

Eminent domain for mining uses in Nevada. Comp. Laws 1900, §§ 283–300. See, also, Act of 1909, pp. 279–289.

**Deeds from state to contain clause reserving minerals.**

Every contract, patent, or deed hereafter made by this state, or the authorized agents thereof, shall contain a provision expressly reserving all mines of gold, silver, copper, lead, cinnabar, and other valuable

minerals that may exist in such land, and the state, for itself and its grantees, hereby disclaims any interest in mineral lands heretofore or hereafter selected by the state on account of any grant from the United States. All persons desiring titles to mines upon lands which have been selected by the state, must obtain such title from the United States under the laws of congress, notwithstanding such selection. Stats. 1887, p. 103, § 2; as amended in 1897, Stats. 1897, p. 36; Comp. Laws 1900, § 282; Rev. Laws 1912, § 2457.

Location of mines on unfenced and unimproved land. Stats. 1907, p. 140. See, also, Comp. Laws 1900, § 3814.

## III. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that the county recorder of each county shall be *ex-officio* district mining recorder, and providing that he be responsible for the safekeeping of all mining records. Gen. Stats. 1885, § 300; Comp. Laws 1900, § 237; Rev. Laws 1912, § 2463.

2. Providing that duplicate copies of mining records be transmitted by local mining recorder to the county recorder, and providing for fees of recorders. Stats. 1885, p. 27, § 1; as amended in 1897, Stats. 1897, p. 77; Comp. Laws 1900, §§ 244–249; Stats. 1909, p. 310; Rev. Laws 1912, §§ 2464–2468, 2470–2474.

3. Providing that each district mining recorder shall transcribe into suitable books and file with the county recorder of the county in which the district is located a copy of the mining records of his district for the preceding three months. Stats. 1881, p. 33; Comp. Laws 1900, §§ 238–243; Rev. Laws 1912, § 2465.

4. Requiring mortgages of quartz and mining claims to be recorded. [An act concerning conveyances (§ 76)], Laws 1861, p. 11; Comp. Laws 1900, § 2715; Rev. Laws 1912, § 1090.

5. The term "lands" to include possessory rights to mines. Comp. Laws 1900, § 2713; Rev. Laws 1912, § 1088.

6. Providing that the act concerning conveyances shall not be so construed as to interfere with local mining rules, regulations or customs in regard to locating, holding, or forfeiting of claims, and giving to mortgagee the right to perform acts to prevent forfeiture. [An act concerning conveyances (§ 77)], Laws 1861, p. 11; Comp. Laws 1900, § 2716; Rev. Laws 1912, § 1091.

7. Subjecting future conveyances of mining claims to same formalities and rules of construction as conveyances of other real estate, but providing that past conveyances should be construed by the local rules and customs. Laws 1862, p. 12; Comp. Laws 1900, §§ 2720–2722; Rev. Laws 1912, §§ 1100–1102.

8. Providing that minors over the age of eighteen may make valid conveyances of mining claims or locations, and confirming past conveyances of mining claims made by such minors. Laws 1869, p. 96; Comp. Laws 1900, §§ 2723, 2724; Rev. Laws 1912, §§ 1103, 1104.

9. Providing for the postponement of trials involving mining claims when it appears that further development is necessary to prepare for trial. Civ. Prac. Act, § 160; Laws 1869, p. 96; Comp. Laws 1900, § 3255; Rev. Laws 1912, § 5203.

10. Providing for partition of mining claims. Civ. Prac. Act, §§ 312–318; Comp. Laws 1900, §§ 3407–3413; Rev. Laws 1912, §§ 5576–5583.

11. Prescribing what is necessary to confer jurisdiction upon a court to try an action involving conflicting rights to a mining claim for which an application for patent has been made. Laws 1873, p. 70; Comp. Laws 1900, § 3985; Rev. Laws 1912, § 5526.

12. Reserving the right to any person for the purpose of prospecting or mining to enter upon lands in the possession of an applicant for purchase thereof from the state. Laws 1887, p. 124; Comp. Laws 1900, § 327. See, also, Stats. 1907, p. 140; Rev. Laws 1912, § 2458.

13. An act to encourage the mining, milling, and smelting, or other reduction of ores in the state of Nevada, declaring such operations to be for public use, and providing that the right of eminent domain may be exercised therefor. Stats. 1875, p. 111; Comp. Laws 1900, §§ 283–300. See, also, Act 1907, pp. 279–289; Rev. Laws 1912, § 5606.

14. Fixing the period of the statute of limitations for the recovery of mining claims at two years, and defining adverse possession of a mining claim to be "holding and working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof." Stats. 1861, p. 26 (as amended, Stats. 1867, p. 85); Comp. Laws 1900, § 3706; Rev. Laws 1912, § 4951.

15. Providing for the location of lands containing salt, requiring the same to be surveyed and the plat thereof to be recorded. Stats. 1865, p. 172; Comp. Laws 1900, §§ 233–236; Rev. Laws 1912, §§ 2447–2450.

16. Providing that an applicant to purchase lands not previously selected by the state shall file an affidavit to the effect that the lands described in the application are nonmineral in character. Stats. 1885, p. 102; Comp. Laws 1900, § 306; Rev. Laws 1912, § 3200.

17. Providing for damages for unlawful encroachment of one mining company upon the property of another, and for an order of inspection and survey in an action concerning a mine or mining claim. Stats. 1862, p. 33 (amended, Stats. 1891, p. 37); Comp. Laws 1900, §§ 250–252. See Stats. 1901, p. 118; Rev. Laws 1912, §§ 5509–5511.

18. An employer's liability act. Laws 1911, p. 362; Rev. Laws 1912, §§ 1915–1928.

19. An act to regulate the purchase of ore. Laws 1907, p. 365; Rev. Laws 1912, §§ 2487–2491.

20. Enabling mining corporations to consolidate, and defining the manner of such consolidation. Stats. 1883, p. 46; Comp. Laws 1900, §§ 260–262; Rev. Laws 1912, §§ 1216–1218.

21. Empowering mining corporations or associations which have advanced money in the development of a mining claim owned in part by them to bring an action against a co-owner thereof for his or her proportion of the money so advanced. Stats. 1865, p. 228; Comp. Laws 1900, §§ 263–270; Rev. Laws 1912, §§ 2476–2482.

22. Providing that ore sent by any citizen of the state shall be analyzed free of charge at the state university. Laws 1895, p. 76; Comp. Laws 1900, §§ 1402–1405; Rev. Laws 1912, §§ 4660–4663.

23. Providing safety regulations for mines. Laws 1911, p. 402; Rev. Laws 1912, §§ 4202–4238.

24. Providing for the use of safety cages and iron bonnets in vertical shafts of more than four hundred and fifty feet in depth, where iron mining cages are used. Stats. 1879, p. 55; Comp. Laws 1900, §§ 277–280; Amended, 1905, p. 199; Rev. Laws, 1912, §§ 6799, 6800; Laws 1913, p. 422.

25. Providing for lien for milling ores. Comp. Laws 1900, § 3901.

26. Providing for lien for miners, materialmen, etc. Comp. Laws 1900, §§ 3881–3901; Amended, 1903, p. 51; 1909, p. 169; Rev. Laws 1912, §§ 2213–2229.

27. Providing that the proceeds alone of mines shall be taxed. Const., art. x, § 1. See Laws 1893, p. 194; Comp. Laws 1900, §§ 148, 1147–1170; Rev. Laws 1912, §§ 3687–3710.

28. Regulating the manner of assessing the proceeds of mines, and providing that an uncollected tax on the proceeds of a mine shall constitute a lien on the mine. Laws 1891, p. 162; Comp. Laws 1900, §§ 1147–1170; Rev. Laws 1912, §§ 3687–3710.

29. Providing for inspection of mines by stockholders. Laws 1877, p. 80; Rev. Laws 1912, §§ 2492–2496.

30. Providing for payment of a bounty to the person first discovering and producing oil or natural gas in the state of Nevada. Stats. 1901, p. 86; Rev. Laws 1912, §§ 702–717.

31. Providing that grubstake contracts shall be recorded or be of no effect except as between the parties. Stats. 1907, p. 370; Rev. Laws 1912, § 2475.

32. Eight-hour law for employees of underground mines and in smelting, reduction, and refining works. Stats. 1903, p. 33; in open-cut mines, Stats. 1909, p. 73; Rev. Laws 1912, §§ 6554–6558.

33. An act creating a school of mines to be located at Virginia City, Nevada. Stats. 1903, p. 211; Rev. Laws 1912, § 4639.

34. An act requiring mining recorders to give receipt for certificates of location filed; also requiring them to authenticate their documents with a seal. Stats. 1907, p. 193; Rev. Laws 1912, §§ 2451–2455.

35. Office of mineral land commissioner created, duties, etc. Stats. 1907, pp. 39, 40; Rev. Laws 1912, § 4146.

36. An act authorizing the location of mines on unfenced and unimproved lands. Stats. 1907, p. 140. See, also, Comp. Laws 1900; Rev. Laws 1912, §§ 2458–2462.

37. An act to facilitate the recovery of stolen ore. Stats. 1907, pp. 416–418. See Comp. Laws 1900, § 4810; Rev. Laws 1912, §§ 2483–2486.

38. An act requiring mining corporations to file statements and mail copies to stockholders, and requiring stamping of promotion stock, etc. Stats. 1909, pp. 62–66; Amended, Laws 1911, p. 408; Rev. Laws 1912, §§ 1330–1340.

39. An act creating inspector of mines and prescribing duties and powers. Stats. 1909, pp. 218–223; Amended, Laws 1911, p. 402; Rev. Laws 1912, §§ 4198–4239.

40. Act forbidding pollution of streams not to apply to quartz-mills and reduction works. Stats. 1909, p. 306; Rev. Laws 1912, § 2047.

41. Compelling the use of water-jets or sprays in stopes and raises to prevent the escape of dust. Laws 1913, p. 167. Same with reference to chutes. Laws 1913, p. 305.

42. Underground passages to be kept clear. Laws 1913, p. 53.

# NEW MEXICO.

I. Laws Relating to the Location, Relocation, and Development of Lode Mining Claims.

II. Laws Relating to the Location and Relocation of Placer Mining Claims.

III. Reference to Miscellaneous Legislation on Mining Subjects.

## I. LAWS RELATING TO THE LOCATION, RELOCATION, AND DEVELOPMENT OF LODE MINING CLAIMS.

**Posting notice—Marking boundaries—Location certificate and record.**

§ 1. Any person or persons desiring to locate a mining claim upon a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, must distinctly mark the location on the ground, so that its boundaries may be readily traced; [1] and post in some conspicuous place on such location a notice in writing, stating thereon the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument as will identify the claims;[2] and, also, within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted. And provided, no other record of such notice shall be necessary.[3] Comp. Laws 1884, p. 754, § 1566; Comp. Laws 1897, § 2286.

[1] Marking boundaries: See next paragraph.

[2] Preliminary notice and its posting discussed: §§ 350–356.
Place and manner of posting: § 356.
Liberal rules of construction applied to notices: § 355.

[3] Section referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record and effect of failure to record within time limited: §§ 389, 390.
Failure to comply with these requirements vitiates the location. Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336.

**Marking boundaries.**

§ 2. The surface boundaries of mining claims hereafter located shall be marked by four substantial posts or monuments, one at each corner of such claim, so as to distinctly mark the claim on the ground, so that its boundaries can be readily traced, and shall otherwise con-

form to section 2286 of the Compiled Laws of 1897. Comp. Laws 1897, § 2299; amended, 1899, p. 111.

This section referred to in text: § 374.

**Discovery shaft and equivalent.**

§ 3. The locator or locators of any mining claim, located after this act shall take effect, shall, within ninety days from the date of taking possession of the same, sink a discovery shaft upon such claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or shall drive a tunnel, adit, or open cut upon such claim to at least ten feet below the surface, exposing mineral in place. Laws 1889, p. 42 et seq., § 1; Comp. Laws 1897, § 2298.

Statute referred to in text: § 343.
Object of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346.

**Amended location certificate and change of boundaries.**

§ 4. If at any time the owner of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that the original notice of location is defective, erroneous, or the requirement of the law has not been complied with before filing; or shall be desirous of changing his surface boundaries or to take in any part of an overlapping claim which has been abandoned; or in case the original notice of the location was made prior to the passage of this act and the owner shall be desirous of obtaining the benefits of this act, such owner may file in the office where notices of locations are by law required to be filed, an amended or additional notice of location, subject to the provisions of this act; provided, that such additional or amended notice of location does not interfere with the existing right of others at the time of filing such notice; and no such amended or additional location, or record thereof, shall preclude the claimant or his assigns from proving any such title as he or they may have held under the previous location. Laws 1889, p. 43 et seq., § 4; Comp. Laws 1897, § 2301.

Objects and functions of amended certificates: § 398.
Circumstances justifying change of boundaries: § 396.
Privilege of changing boundaries independent of state legislation: § 397.

**Relocation of mining claims.**

§ 5. The relocation of any mining ground, which is subject to relocation, shall be made in the same way as an original location is required by law to be made, except the relocator may either sink a new shaft upon the ground relocated to the depth of at least ten

feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or drive a new tunnel, adit, or open cut upon such ground at least ten feet below the surface, exposing mineral in place, or the relocator may sink the original discovery shaft ten feet deeper than it is at the time of relocation, or drive the original tunnel, adit, or open cut upon such claim ten feet farther. Laws 1889, p. 42 et seq., § 3; Comp. Laws 1897, § 2300.

When relocation may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators, in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Right of second locator to improvements made by first: § 409.

**Proof of annual labor.**

§ 6. The owner or owners of any unpatented mining claim in this territory, located under the laws of the United States and of this territory, shall, within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be *prima facie* evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall in any contest, suit or proceedings touching the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law. Laws 1897, p. 127, § 8; Comp. Laws 1897, § 2315.

Proof of annual labor discussed in text: § 636.
Annual labor discussed: §§ 623–638.

**Local rules, to be made by certain land owners—Recording.**

§ 7. The owner or owners of lands within this territory, the title to which has been vested by letters patent from the United States government, may make and file in the office of the county clerk of the county in which such lands are situated, such rules and regulations, not inconsistent with the laws of the United States, and of this territory, as they may see fit, governing the location and acquisition of mining claims thereon, which rules and regulations when so filed shall be binding upon all parties, and a copy thereof duly certified by the county recorder shall be received and admitted as evi-

dence in any suit or proceedings relating to such mining claims; such rules and regulations may be changed and supplemented from time to time by other rules and regulations filed in like manner, providing that such change shall not affect rights acquired thereto. Comp. Laws 1897, § 2314.

## II. LAWS RELATING TO THE LOCATION AND RELOCATION OF PLACER MINING CLAIMS.

**Deposits subject to placer location.**

§ 1. All public lands in the territory of New Mexico chiefly valuable for the deposits of gypsum, fire-clay, petroleum oil, natural gas, alluvial deposits of gold, and all other material recognized by the laws of the United States as placer material may be located as placer mining claims as hereinafter provided. Laws 1909, p. 190.

**Notice of location—Posting and contents.**

§ 2. The locator or locators shall, at the time of making location of any placer mining claim, cause a notice of such location to be placed at a designated corner of the claim so located, stating the name of the claim, the purpose and the kind of material for which such claim is located, the name or names of the persons locating same; and, if located upon surveyed lands, such notice shall contain a description of such claim by its legal subdivision; if upon unsurveyed lands, such notice shall contain a description of such claim by metes and bounds, with reference to some known object or monument. And whether upon surveyed or unsurveyed lands each corner of such claim shall be marked by a wooden post at least four feet high, securely set in the ground, or by a substantial stone monument. Laws 1909, p. 190.

**Recording notice—Time within which discovery to be made.**

§ 3. A duplicate of such location notice shall be filed and recorded in the office of the probate clerk of the county wherein the land located is situate, within ninety days after such location is made and such notice placed on the claim as aforesaid; and, prior to filling said notice, the locator or locators must have made a *bona fide* discovery of the mineral or material claimed in said notice or said location will be void and subject to relocation by another person or persons: Provided, however, That in cases where lands have been located for petroleum oil or natural gas, the locator or locators shall have the time from the date of the location to the end of the calendar year succeeding that in which the location is made, to make a discovery of petroleum oil or natural gas: Provided, further, That when lands have been located for petroleum oil or natural gas, or both, the locator or locators thereof shall have the right to the exclusive possession and occupancy of the lands embraced in said location for the purpose of prospecting for petroleum oil or natural gas,

during the period of time provided in this section for making discovery of petroleum oil or natural gas or both. Laws 1909, p. 190.

**Size of claim—Annual labor.**

§ 4. The size of the claim or claims to be located under this act, and the amount of annual assessment work to be done thereon in order to hold possession of and secure patent to the same, shall be the same as provided by Revised Statutes of the United States. Laws 1909, p. 190.

**Prior location may have benefit of act.**

§ 5. Any person or persons who have heretofore made location of placer mining claims in this territory may avail themselves of this act by complying with the provisions of this act within thirty days after its passage and approval. Laws 1909, p. 190.

§ 6. All acts and parts of acts in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after its passage and approval. Laws 1909, p. 190.

This statute criticised and its validity as to time allowed for discovery doubted: §§ 437, 443.
Statute referred to: §§ 442, 446, 456, 459.

## III. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Requiring the probate clerk to provide books of record in which to record mining claims, and regulating fees to be paid such clerks for recording claims. Comp. Laws 1884, p. 754, § 1567; Comp. Laws 1897, p. 589, § 2287.

2. Prescribing the cases in which an action of ejectment will lie for the recovery of a mining claim. Comp. Laws 1884, p. 756, § 1570; Comp. Laws 1897, p. 589, § 2289.

3. Force and effect of local customs and regulations as evidence in actions concerning mining claims. Laws 1882, p. 95, § 1.

4. Establishing a free miners' hospital. Laws 1903, p. 5.

5. An act relating to the termination of leases upon mines. Laws 1891, p. 132; Comp. Laws 1897, p. 603, §§ 2358, 2359.

6. Providing a penalty for the larceny of ores and for the purchase of stolen ores by persons having a knowledge of the theft. Laws 1891, p. 133; Comp. Laws 1897, p. 595 et seq., §§ 2316, 2317.

7. Providing penalty for slander of title of mine. Laws 1889, p. 23; Comp. Laws 1897, p. 598, § 2326.

8. Providing penalty for removing boundary objects and notices. Laws 1889, p. 43, § v; Comp. Laws 1897, p. 591, § 2302.

9. Providing the manner in which mining claims shall be abandoned. Laws 1889, p. 43, § vi; Comp. Laws 1897, p. 592, § 2303.

10. Providing that mortgagee or lienholder may perform annual labor where the owner neglects to do so, and providing a penalty for obstructing lienholder in his work. Laws 1889, p. 44, § vii; Comp. Laws 1897, p. 592, § 2304.

11. An act to facilitate the recovery of ore taken by theft or trespass. Laws 1889, p. 244.

12. Regulating damages for injury to mine by livestock. Laws 1889, p. 248; Comp. Laws 1897, p. 598, § 2327.

13. An act in relation to bringing suits where mining claims are contested before the United States land office, and acts amendatory thereto. Laws 1887, p. 205; Laws 1889, p. 276; Comp. Laws 1897, p. 589, §§ 2290, 2291.

14. An act providing for the weighing of coal at mines. Laws 1889, p. 299; Comp. Laws 1897, p. 601, §§ 2350–2354.

This act, though regularly passed and approved, has no enacting clause

15. Providing for the establishment of a school of mines. Laws 1889, p. 324, § 3; Comp. Laws 1897, p. 888, § 3592 et seq.

16. An act to provide for the condemnation of rights of way for tramways over any lands. Laws 1889, p. 347; Comp. Laws 1897, p. 598, §§ 2328–2336.

17. Relating to certain evidence in mining suits. Laws 1887, p. 206.

18. Relating to the right to survey and inspect mines. Laws 1887, p. 206; Comp. Laws 1897, p. 590, §§ 2293–2297.

19. Providing a penalty for altering, defacing, or changing the location notice of any mining claim. Laws 1897, p. 125, § 3; Comp. Laws 1897, p. 594, § 2311.

20. Providing a penalty for relocating or attempting or assisting to relocate, or attempting to hold possession of any forfeited mining claim, except as provided for. Laws 1897, p. 126, § 4; Comp. Laws 1897, p. 594, § 2312.

21. Providing a penalty for unlawfully entering with intent to hold possession of a mining claim against one lawfully in possession. Laws 1897, p. 126, § 5; Comp. Laws 1897, p. 594, § 2313.

22. Partial exemption of mines and mining property from taxation. Comp. Laws 1897, p. 433, § 1560, and p. 471, § 1756; Laws 1899, p. 130.

23. Giving the miner a lien on the claim for work done. Comp. Laws 1897, p. 573, § 2217.

24. Making the obstruction of the performance of annual labor a misdemeanor and providing penalty. Comp. Laws 1897, p. 593, § 2305.

25. Providing for doing of assessment work on contested mine by order of court. Laws 1905, p. 196.

26. Giving the stockholders the right to enter and examine the mine, and providing a penalty for the refusal to permit its exercise. Comp. Laws 1897, §§ 2306, 2307.

27. Requiring persons engaged in milling, concentrating, or sampling ores to keep a record book, and providing a penalty for failure to do so. Comp. Laws 1897, § 2318 et seq.

28. Penalizing the altering or changing of the true value of the ore. Comp. Laws 1897, § 2324.

29. Requiring smelting companies to provide for its employees who are disabled by lead poisoning. Comp. Laws 1897, §§ 2337, 2338.

30. Providing for the safety of workmen in coal mines. Laws 1882, ch. 57; Comp. Laws 1897, §§ 2339–2349.

31. Prohibiting the issuance to employees of scrip or order payable otherwise than in money, and the compelling of employees to deal with any particular person, and providing penalties. Comp. Laws 1897, p. 602, §§ 2355–2357.

32. Regulating fees for filing of certificates of incorporation of mining and other corporations, and requiring the filing of annual balance sheets with the secretary of the territory by such corporations. Laws 1899, p. 171.

33. Requiring mining companies, under certain conditions, to provide pesthouses for sick employees. Laws 1899, p. 134.

34. Defining stockholders. Laws 1884, ch. 45, § 1; Comp. Laws 1897, p. 593, § 2308.

35. Defining mines as real estate. Laws 1884, ch. 6, § 5; Comp. Laws 1897, p. 994, § 4014.

36. An act to punish trespassers after posting of notice on property. Laws 1905, p. 67.

37. Regulating the casing of oil and gas wells and plugging same when abandoned. Laws 1912, p. 53.

38. Creating a state land department and providing for the location and leasing of mineral lands belonging to the state. Laws 1912, p. 174.

# NORTH DAKOTA.

I. Legislation Relating to Acquisition of Title to Lode Claims.

II. Reference to Miscellaneous Legislation on Mining Subjects.

## I. LEGISLATION RELATING TO ACQUISITION OF TITLE TO LODE CLAIMS.

**Length of lode claims.**

§ 1. The length of any lode claim hereafter located within this state may equal but shall not exceed fifteen hundred feet along the vein or lode. Rev. Code 1895, § 1426; Id. 1899, § 1426; Id. 1905, § 1800.

See text: §§ 250 (I), 361.

**Lode claims, width.**

§ 2. The width of lode claims shall be one hundred and fifty feet on each side of center of the vein or crevice; provided, that any county may at any general election determine upon a greater width, not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at such election, and any county by such vote at such election may determine upon a less width than specified; provided, that less than twenty-five feet on each side of the vein or lode shall be prohibited. Rev. Code 1895, § 1427; Id. 1899, § 1427; Id. 1905, § 1801.

Statute referred to in text: § 361.
Location covering excessive area: § 362.
Provision of federal law: Rev. Stats. U. S., § 2320, *ante*, p. 2237.
See note to preceding section.

**Location certificate—Contents and record.**

§ 3. The discoverer of a lode shall within sixty days from the date of discovery record his claim in the office of the register of deeds of the county in which such lode is situated by a location certificate, which shall contain:

1. The name of the lode;

2. The name of the locator;

3. The date of the location;

4. The number of feet in length claimed on each side of the discovery shaft;

5. The number of feet in width claimed on each side of the vein or lode;

6. The general course of the lode, as near as may be. Rev. Code 1895, § 1428; Id. 1899, § 1428; Id. 1905, § 1802.

Section referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record and effect of failure to record within time limited: §§ 389, 390.

**Location certificate void, when.**

§ 4. Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the number of feet in width claimed, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void. Rev. Code 1895, § 1429; Id. 1899, § 1429; Id. 1905, § 1803.

Effect of failure to comply with law as to contents of certificate: § 384.

**Discovery shaft—Posting notice—Manner of locating claim.**

§ 5. Before filing such location certificate the discoverer shall:

1. Locate his claim by first sinking a discovery shaft thereon sufficient to show a well-defined mineral vein or lode;[1]

2. By posting at the point of discovery on the surface, a plain sign or notice containing the name of the lode, the name of the locator and the date of discovery, the number of feet claimed in length on either side of the discovery and the number of feet in width claimed on each side of the lode;[2]

3. By marking the surface boundaries of the same. Rev. Code 1895, § 1430; Id. 1899, § 1430; Id. 1905, § 1804.

[1] Section referred to in text: §§ 343, 352.
Object of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346.
Can preliminary work required by state laws as an act of location be credited on first year's work? § 632.

[2] Place and manner of posting: § 356.
Liberal rules of construction applied to notices: § 355.

**Marking boundaries.**

§ 6. Such surface boundaries shall be marked by eight substantial posts, hewed or blazed on the side facing the claim and plainly marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk in the ground as follows: One at the corner and one at the center of each side-line and one at each end of the lode. When it is impracticable on account of rock or precipitous ground to sink such posts, they may be placed in a monument of stone. Rev. Code 1895, § 1431; Id. 1899, § 1431; Id. 1905, § 1805.

Section referred to in text: § 374.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the federal law? § 373.
Perpetuation of monuments: § 375.

**Equivalent of discovery shaft.**

§ 7. Any open cut, crosscut or tunnel at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. Rev. Code 1895, § 1432; Id. 1899, § 1432; Id. 1905, § 1806.

Subject discussed in text: §§ 343–346.

**Time within which discovery shaft must be completed.**

§ 8. The discoverer shall have sixty days from the time of uncovering or disclosing a lode in which to sink a discovery shaft thereon. Rev. Code 1895, § 1433; Id. 1899, § 1433; Id. 1905, § 1807.

See note to § 5, *ante*.
Section referred to in text: § 343.

**Intralimital and extralateral rights.**

§ 9. The location or location certificate of any lode claim shall be so construed as to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended vertically, with such parts of all lodes or ledges as continue by dip beyond the side-lines of the claim, but shall not include any portion of such lodes or ledges beyond the end-lines of the claim or the end-lines continued, whether by dip or otherwise, or beyond the side-lines in any other manner than by the dip of the lode. Rev. Code 1895, § 1434; Id. 1899, § 1434; Id. 1905, § 1808.

Validity of legislation questioned: § 251.

**Lode not to be pursued on strike beyond end-line.**

§ 10. If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior. Rev. Code 1895, § 1435; Id. 1899, § 1435; Id. 1905, § 1809.

Validity of such legislation questioned: § 251.

**Amended location certificate—Change of boundaries.**

§ 11. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the

law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefit of this chapter, such locator or his assigns may file an additional certificate subject to the provisions of this chapter; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation; and no such relocation nor the record thereof shall preclude the claimant from proving any such title as he may have held under previous locations. Rev. Code 1895, § 1437; Id. 1899, § 1437; Id. 1905, § 1811.

Objects and functions of amended certificates discussed in text: § 398.
Circumstances justifying change of boundaries: § 396.
Privilege of changing boundaries exists in absence of intervening rights independent of state legislation: § 397.

**Relocation of abandoned lode claims.**

§ 12. The relocation of abandoned lode claims shall be made by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim, or the relocator may sink the original shaft, cut, or adit to a sufficient depth to comply with sections 1804 and 1808, and erect new or adopt the old boundaries, renewing the posts, if removed or destroyed. In either case a new location stake shall be erected. In any case whether the whole or part of an abandoned claim is taken, the location certificate must state that the whole or any part of the new location is located as abandoned property. Rev. Code 1895, § 1439; Id. 1899, § 1439; Id. 1905, § 1813.

Statute referred to in text: § 408.
Circumstances under which relocations may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Right of second locator to improvements made by first: § 409.

**Amount of annual work.**

§ 13. The amount of work to be done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States; provided, that the period within which the work required to be done annually on all unpatented claims so located shall commence on the first day of January succeeding the date of the location of such claim. Rev. Code 1899, § 1438; Id. 1905, § 1812.

**Location certificate must contain description of but one location.**

§ 14. No location certificate shall claim more than one location, whether the location is made by one or several locators; and if it purports to claim more than one location it shall be absolutely void, except as to the first location therein described; and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all. Rev. Code 1895, § 1440; Id. 1899, § 1440; Id. 1905, § 1814.

Location certificate and its contents discussed: §§ 379–385.

**Local customs and regulations, how far binding.**

§ 15. In actions respecting mining claims proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state and the United States, must govern the decision of the action. Rev. Code 1895, § 5918; Id. 1899, § 5918; Id. 1905, § 7536.

Subject discussed in text: §§ 268–275.
Permissive scope of local regulations: § 270.
Acquiescence and observance, not mere adoption, the test: § 271.
Regulations, how proved; their existence a question of fact for the jury; their construction a question of law for the court: § 272.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Relating to the duty of officials and mine owners to furnish information and statistics to commissioner of agriculture and providing punishment for failure so to do. Rev. Code 1895, § 124; Id. 1899, § 124; Id. 1905, § 128.

2. Providing that when the right to mine is separate from the ownership of the surface ground, the owner of surface is entitled to security. Rev. Code 1895, § 1436; Id. 1899, § 1436; Id. 1905, § 1810.

3. Conferring authority on the district judges to order surveys in cases of disputed mining property. Rev. Code 1895, § 1442; Id. 1899, § 1442; Id. 1905, § 1816.

4. Providing that writs of injunction may be issued for affirmative relief, having the force and effect of writs of restitution, restoring to possession person improperly ousted from mining property. Rev. Code 1895, § 1443; Id. 1899, § 1443; Id. 1905, § 1817.

5. Regulating the organization of mining corporations. Rev. Code 1895, §§ 3154–3161; Id. 1899, §§ 3154–3161; Id. 1905, §§ 4514–4521.

6. Providing punishment for conspiracy to obtain possession of a mining claim in the actual possession of another by force, violence, or stealth. Rev. Code 1899, § 7662; Id. 1905, § 9436.

7. Providing that if the death of any person results from the entry of a mining claim in accordance with a conspiracy to enter by force of numbers, all persons so entering are guilty of murder in the second degree. Rev. Code 1899, § 7083; Id. 1905, § 8814.

8. Giving a lien on a mine for materials furnished or labor done thereon, and providing the manner of perfecting and foreclosing the same. Rev. Code 1899, §§ 4805–4812; Id. 1905, §§ 6256–6263.

9. Fixing fee of register of deeds for recording location certificate and furnishing certified copy thereof. Rev. Code 1899, § 1441; Id. 1905, § 1815.

10. Authorizing the board of trustees of the North Dakota agricultural college to co-operate with the federal surveys in completing a topographic, agricultural, and geological survey of North Dakota; making it the duty of the director thereof to collect and place on exhibition samples of all rock, soils, coals, clays, minerals, etc.; and providing that "any lands belonging to the state or lands known as school lands and public institution lands, in which is discovered any valuable deposit of coal or minerals of any kind, clay, gravel, or stone, shall be and remain the property of the state until provision for the same and leasing thereof is especially provided by law." Laws 1901, ch. viii, p. 14; Rev. Code 1905, §§ 1121–1132.

11. Providing for eminent domain for mines. Rev. Code 1905, § 7575.

12. Providing for inspection of coal mines by state engineer. Laws 1907, p. 77.

13. Providing for the keeping of coal mine statistics, and for the licensing of coal mine operators. Laws 1907, p. 72.

14. Prohibiting children between the ages of eight and fourteen from working in any mine or factory during school hours, and providing a penalty for violating the law. Rev. Code 1905, §§ 897, 898.

15. Providing for covering abandoned coal mines and wells and assessing the cost of having the same done by public employees against property holders who fail to comply with this regulation after thirty days' notice. Rev. Code 1905, §§ 1416, 1417.

16. Establishing a mining experiment substation, under the direction of the state school of mines at the state university, and providing for its management. Laws 1909, pp. 239, 240.

17. Providing for the filing of a statement of general financial condition and assets of mining companies before any stock shall be placed on sale, and prescribing a form for such statement and a penalty for noncompliance with this regulation. Laws 1909, pp. 241–243.

Providing for tests and experiments in school of mines. Laws 1907, p. 373.

# OREGON.

I. Laws Relating to Location and Recording of Mining Claims.

II. Reference to Miscellaneous Legislation on Mining Subjects.

## I. LAWS RELATING TO THE LOCATION AND RECORDING OF MINING CLAIMS.

*(Mining Act of October 14, 1898, and amendments.)*

**Mining claims, who may locate—Location notice—Marking boundaries.**

§ 1. Any person, a citizen of the United States, or one who has declared his intention to become such, who discovers a vein or lode of mineral-bearing rock in place, upon the unappropriated public domain of the United States within this state, may locate a claim upon such vein or lode so discovered, by posting[1] thereon a notice of such discovery or location, which said notice shall contain: First, the name of the lode or claim; second, the name or names of the locator or locators; third, the date of the location; fourth, the number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the said lode or vein;[2] fifth, the general course or strike of the vein or lode as nearly as may be, with reference to some natural object or permanent monument in the vicinity thereof;[3] and by defining the boundaries upon the surface of each claim so that the same may be readily traced. Such boundaries shall be marked within thirty days after posting of such notice by six substantial posts, projecting not less than three feet above the surface of the ground, and not less than four inches square or in diameter, or by substantial mounds of stone, or earth and stone, at least two feet in height, to wit, one such post or mound of rock at each corner and at the center ends of such claims. Laws 1901, p. 140; Ballinger's Code, § 3975; Lord's Laws, § 5128.

Marking boundaries: §§ 371–375.
Section referred to in text: §§ 353, 374, 380.

[1] Place and manner of posting: § 356.

[2] Surface area, length, and width of lode claims: § 361.

[3] Liberal rules of construction applied to notices: § 355.
Purpose of location certificate: § 379.
Rules of construction applied to location certificate: § 381.
Effect of failure to comply with laws as to contents of certificate: § 384.

**Recording notice of location and affidavit of performance of development work.**

§ 2. Such locator shall, within sixty days from and after the posting of the location notices by him upon the lode or claim, file for

record with the recorder of conveyances, if there be one, who shall be the custodian of mining records and miners' liens, otherwise with the clerk of the county wherein the said claim is situated, a copy of the notice so posted by him upon the lode or claim, having attached thereto an affidavit showing that the work required to be done by section 3977 has been done and performed, and shall pay to the recorder or clerk a fee of one dollar for such record thereof, which said sum the recorder or clerk shall immediately pay over to the treasurer of such county, and shall take his receipt therefor, as in case of other county funds coming into the possession of such officer. Such recorder or clerk shall immediately record such location notice and the affidavit annexed thereto. No location notice shall be entitled to record, or recorded, until the work required by section 3977 has been done and the affidavit in proof thereof is attached to the notice to be recorded. Laws 1901, p. 140; Ballinger's Code, § 3976; Lord's Laws, § 5129.

The record: §§ 389–392.
Section referred to in text: §§ 343, 353.

**Development work—Affidavit of performance of.**

§ 3. Before the expiration of sixty days from the date of the posting of the notice of discovery upon his claim as aforesaid, and before recording the notice of location as required by section 3976, the locator must sink a discovery shaft upon the claim located to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode or vein of mineral deposit in place. A cut or crosscut or tunnel which cuts the lode at a depth of ten feet, or an open cut at least six feet deep, four feet wide, and ten feet in length along the lode from the point where the same may be in any manner discovered, is equivalent to such discovery shaft. Such work shall not be deemed a part of the assessment work required by the Revised Statutes of the United States. The locator, or some one for him, who did work upon and has knowledge of the facts relating to the sinking of the discovery shaft, shall make and attach to the copy of the notice of location to be recorded an affidavit showing the compliance by the locator with the provisions of this section, which affidavit shall be recorded with such copy of the location notice. Laws 1901, p. 141; Ballinger's Code, § 3977; Lord's Laws, § 5130.

Section referred to in text: §§ 343–346.

**Abandoned claims.**

§ 4. Abandoned claims shall be deemed unappropriated mineral lands, and titles thereto shall be obtained as in this act specified,

without reference to any work previously done thereon. Laws 1898, p. 17; Ballinger's Code, § 3978; Lord's Laws, § 5131.

Relocation of forfeited or abandoned claims: §§ 402–409.

**Locations not in conformity with provisions of act of October 14, 1898, void.**

§ 5. Any and all locations or attempted locations of quartz mining claims within this state subsequent to the thirty-first day of December, 1898, that shall not comply and be in accordance with the provisions of this act shall be null and void. Laws 1898, p. 18; Ballinger's Code, § 3984; Lord's Laws, § 5137.

**Annual assessment work—Notice of to co-owners—Forfeiture of interest.**

§ 6. Whenever any quartz or placer mines shall be owned by one or more persons, companies, or corporations, or when any person, company, or corporation shall own any quartz or placer mines, in common with any other person, company, or corporation, any such person, company, or corporation owning an interest in said mine or mines, whether said interest be legal or equitable, shall have the right to perform the annual assessment work required by the laws of the United States and of the state of Oregon to be performed upon such mine or mines; such work, when so performed, shall, when it complies with the laws of the United States and of the state of Oregon, protect such mine or mines from relocation. Upon the failure of any one of several co-owners of such mine or mines to contribute his proportion of the expenditures required in such assessment work, or to perform or pay for his or their proportion thereof, the co-owner or co-owners of such mine or mines who have performed or caused to be performed the said labor or assessment work, may, at the expiration of the year for which such assessment work was performed, give such delinquent co-owner or co-owners notice that the assessment work for said year has been performed, stating by whom performed, and the amount of work performed, and the dates between which the same was performed, together with a statement of the amount due from said delinquent co-owner or co-owners for his or their proportion of said assessment work, and requiring said delinquent co-owner or co-owners, within ninety days from the date of the service of said notice, to pay to the co-owner or co-owners who performed or caused to be performed such assessment work, his or their proportion thereof. Such notice shall further state that if such delinquent co-owner or co-owners shall fail or refuse to contribute his or their proportion due for the said assessment work, his or their interest in said mine or mines shall become the property of such co-owner or co-owners who have performed or caused to be performed such assessment work. Such notice shall be

in writing and signed by the co-owner or co-owners who performed or caused to be performed such assessment work, and shall be served upon said delinquent co-owner or co-owners, personally, by the sheriff of the county in which said mines are situate, if said delinquent co-owner or co-owners be within said county. If said delinquent co-owner or co-owners can be found in any other county within the state of Oregon, then such notice shall be served by the sheriff of such county in which said delinquent co-owner or co-owners then are. If said delinquent co-owner or co-owners cannot be found within the state of Oregon, or if said delinquent co-owner or co-owners be at the time of giving said notice without the state of Oregon, then the service of said notice shall be made by the publication thereof in the weekly newspaper published in said county nearest to where said mines are situate; if there be two or more papers published in said county at the same distance from said mines, then the co-owner or co-owners giving such notice may elect as to which paper said notice shall be published in. If there be no weekly newspaper published within said county, then service of said notice shall be made by publication in any other weekly newspaper within the state of Oregon, published nearest the said mines; said notice shall be published at least once a week for a period of ninety days from and after the first publication thereof. If said notice shall be served by any sheriff of this state, as herein provided, such sheriff shall make return thereof by filing such notice with his return showing such service with the county recorder for the county within which such mine or mines are situate, if there be a county recorder in said county; and, if not, he shall file the same with the county clerk in such county in which said mine or mines are situate. If personal service of such notice cannot be had, as herein provided, proof of such service shall be made by the filing with the county recorder of the county in which said mine or mines are situate, if there be a county recorder, and if there be no county recorder in said county, then by filing with the county clerk of said county said notice as published, attached to an affidavit, made by the printer, foreman, or publisher of such newspaper, to the effect that such newspaper is of general circulation throughout said county, is published weekly, and that such notice was published at least once a week in said newspaper for a period of not less than ninety days from and after the first publication thereof. That at the expiration of ninety days from the date of the personal service of said notice upon said delinquent co-owner or co-owners, or, if at the expiration of ninety days from the date of the last publication of said notice, said delinquent co-owner or co-owners shall not have paid to the co-owner or co-owners who performed or caused to be performed such assessment work, his or their proportion thereof, then the title to the interest of said delinquent co-owner or co-owners

in said mine or mines shall be immediately vested in the co-owner or co-owners who performed or caused to be performed such assessment work; and the co-owner or co-owners who performed such assessment work shall be entitled to file with the county recorder of the county where said mines are situate, or, if there be no county recorder in said county, then with the county clerk of said county, his or their affidavit or affidavits, to the effect that said payment has not been made; and upon the filing of such affidavit or affidavits said county recorder or county clerk, as the case may be, shall record such notice, proof of service thereof, and affidavit or affidavits in a book kept by him for such purpose, and shall then and there issue to such co-owner or co-owners who shall have performed or caused to be performed such assessment work, a certificate to the effect that he has filed and recorded said notice, proof of service, and affidavit or affidavits of nonpayment, and to the effect that such co-owner or co-owners who have performed or caused to be performed such assessment work, have become and are the owners of all of the right, title, and interest of said delinquent co-owner or co-owners of said property. Such certificate shall not be issued until such co-owner or co-owners entitled to the same shall have paid to the said county recorder or county clerk, as the case may be, a fee of $1 for such certificate. If prior to the issuing of such certificate, there shall be filed with said county recorder or county clerk an affidavit or affidavits to the effect that such payment has not been made by such delinquent co-owner or co-owners, and there shall also within said time have been filed with said county recorder or county clerk an affidavit by the delinquent co-owner or co-owners that such payment has been made, then said county recorder or county clerk, as the case may be, shall not issue such certificate, but such parties shall be left to establish such fact by suit to quiet the title to said premises, and if, in such suit, it shall appear either that the assessment work was not performed by the co-owner or co-owners claiming to have performed the same, or that the delinquent co-owner or co-owners have performed or paid his or their proportion of said assessment work, then a decree shall be entered in said suit to that effect; but if, in said suit, it shall be established that said assessment has been performed by or has been caused to be performed by the co-owner or co-owners claiming to have performed, or caused the same to have been performed, and that the delinquent co-owner or co-owners have not performed their proportion thereof, or have not paid their proportion thereof, then a decree shall be entered therein decreeing the co-owner or co-owners who have performed said assessment work to be the owner or owners of all of the interest of said delinquent co-owner or co-owuers in said premises, which decree shall be entitled to record in the miscellaneous records

kept by the county recorder or county clerk in said county, and shall be indexed in the index with the record of deeds and mining conveyances for said county. Such certificate when issued as herein provided, shall be equivalent to a deed from such delinquent co-owner or co-owners of all of their interests in and to all of said mines described in such notice, and shall convey the interest of the delinquent co-owner or co-owners in said premises to the co-owner or co-owners who performed or caused to be performed such assessment work; such certificate may be introduced in evidence in any cause where the ownership of said property may become material, and when so introduced shall have the same force and effect as would a duly executed and delivered deed from such delinquent co-owner or co-owners of said premises, a certified copy of such certificate, and the certified copy of such notice and return when made and certified to by such county recorder or county clerk, as the case may be, shall be admissible in evidence in any trial where it is material to establish the proof of service of such notice or the ownership of said property. Such certificate, when given by such recorder or county clerk, shall be entitled to record in the office of the officer issuing the same, upon the payment of the same fees as are required for the recording of said mining conveyances; such county clerk or county recorder, as the case may be, shall keep a record book, showing the record of such certificates as shall be recorded by him, and upon recording the same shall index the said certificates in a book kept by him for that purpose, and shall likewise index the same in the deed records of mining conveyances kept by him. Such indexing and recording shall have the same force and effect as the indexing and recording of deeds to other real property, and shall give like constructive notice. Laws 1903, p. 326, § 1; Lord's Laws, §§ 5141–5151.

**Number of claims that may be located by one person.**

§ 7. Any person may hold one claim by location, as hereinafter provided, upon each lead or vein, and as many by purchase as the local laws of the miners in the district where such claims are located may allow; and the discoverer of any new lead or vein, not previously located upon, shall be allowed one additional claim for the discovery thereof. Nothing in this section shall be so construed as to allow any person, not the discoverer, to locate more than one claim upon any one lead or vein. Hill's Annot. Laws of Oregon (1892), § 3829; Ballinger's Code, § 3974; Lord's Laws, § 5127.

No limitation under federal law as to number of claims which may be located by an individual: § 361.

**Location on stream or contiguous to placer mine subject to right of prior mines to discharge debris.**

§ 8. That any location of any mining claim made upon any natural stream, or contiguous or near to any placer mine, or upon or below

the dump of any placer mine, shall be subject to the prior right of all mines in operation prior to the making of such location, to discharge debris, gravel, earth, and slickens as the same was discharged, or may be discharged, at the time of making such subsequent location of mining claim or claims. Laws 1901, p. 122; Ballinger's Code, § 3986; Lord's Laws, § 5139.

**Grubstake contracts to be in writing.**

§ 9. All contracts of mining copartnership, commonly known as "grubstaking," shall be in writing, and filed for record with the recorder of conveyances of the county wherein locations thereunder are made. Such contracts must contain, *first*, the names of the parties thereto, and, *second*, the duration thereof; otherwise, such contracts shall be null and void. Laws 1898, p. 18; Ballinger's Code, § 3985; Lord's Laws, § 5138.

**Amendment of notices of location.**

§ 10. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that the original notice of location of said mining claim was defective, erroneous, or that the requirements of the law had not been complied with before the filing of the said notice, such locator, or his assigns, may post and file for record in the manner now provided by law, an amended notice of the said location which shall relate back to the date of the original location; *provided*, that the posting and filing of such amended notice of location shall not interfere with the existing rights of others at the time of posting such amended notice of location. Laws 1905, p. 254; Lord's Laws, § 5140.

**Mining claims may be located on state lands.**

§ 11. The manner of locating a mineral claim upon state land shall be in accordance with the law of the state regulating the location of mineral claims on government lands; *provided*, that any citizen or citizens who may have found minerals on unsold state lands previous to the passage of this act and posted notices in accordance with the mining laws of the state of Oregon and the United States, shall have preference right to lease the same, and shall have ninety (90) days after the passage of this act, in which to make application to the state land board for such lease. Laws 1907, p. 214; Lord's Laws, § 3902.

See provisions for leasing mines on state lands, Laws 1907, p. 214.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that all mining claims, whether quartz or placer, shall be real estate, and that possessory right thereto will sustain an action of ejectment. Laws 1898, p. 17; as amended, Laws 1899, p. 62; Ballinger's Code, § 3979; Lord's Laws, § 5132.

2. Providing that, prior to patent, mining claims shall be exempt from taxation, except as to improvements and machinery thereon. Laws 1898, p. 17; Ballinger's Code, § 3980; Lord's Laws, § 5133.

3. Providing that conveyances of mining claims shall be subject to the laws governing transfers and mortgages of other realty, but in case of execution sale, the judgment debtor can only redeem within sixty days. Laws 1898, p. 17; Ballinger's Code, § 3981; Lord's Laws, § 5134.

4. Providing that redemptioner, after sale by judgment or decree, shall pay, in addition to the sums usually required by law, such sums as may have been expended upon the property by the purchaser in order to keep the possessory right alive. Laws 1898, p. 18; Ballinger's Code, § 3982; Lord's Laws, § 5135.

5. Declaring ditches and mining flumes to be real estate, and determining what shall constitute abandonment thereof. Laws 1898, p. 18; Ballinger's Code, § 3983; Lord's Laws, § 5136.

6. Securing liens for laborers on mining claims, and materialmen, and prescribing the manner of their enforcement. Laws 1899, p. 180; Ballinger's Code, §§ 5668–5672; Amended 1907, p. 293; Lord's Laws, §§ 7444–7450.

7. Providing for the establishment of a uniform system of mine-bell signals, and providing a penalty for failure to comply therewith. Laws 1901, p. 151; Ballinger's Code, §§ 3987–3990; Lord's Laws, §§ 5152–5155.

8. Providing that the use of water from lakes and running streams for mining and electrical power shall be a public use. Laws 1899, p. 172; Ballinger's Code, § 5022; Lord's Laws, § 6551.

9. Chinese prohibited from owning or working mining claim. Constitution, art. xv, sec. 8.

10. Providing for right of eminent domain in behalf of mines. Ballinger's Code, § 5093; Lord's Laws, §§ 6857–6868.

11. Penalty for trespass with intent to commit felony, and for robbing sluice-box, mill, etc. Ballinger's Code, § 1850; Lord's Laws, § 1989.

12. Right of way over state lands for mining purposes. Ballinger's Code, §§ 3338, 3339; Lord's Laws, §§ 3940, 3941.

13. Eight-hour law in underground mines in shafts over one hundred and fifty feet in depth and in tunnels over two hundred feet in length. Laws 1907, p. 311; Lord's Laws, §§ 5058, 5059.

14. Providing for leasing of mining rights on state lands by state land board. Laws 1907, p. 214; Lord's Laws, §§ 3900–3906.

15. Imposing a penalty for injury to location stakes, monuments, etc. Laws 1901, p. 175; Ballinger's Code, § 1849; Lord's Laws, § 1981.

16. Providing that corporations doing an exclusive mining business shall be exempt from annual license tax upon filing certain statements with secretary of state, but shall pay in lieu an annual license fee of ten dollars. Laws 1905, p. 375; Lord's Laws, § 6713; Amended Laws 1911, p. 40; Amended Laws 1913, p. 111.

17. Providing that mining corporations may have a majority of nonresident directors, and that it shall be lawful for them to hold meetings outside of the state. Laws 1905, p. 322; Lord's Laws, § 6690.

18. Providing that no intoxicating liquors shall be sold within a mile of any mine except in incorporated towns. Laws 1901, p. 292; Ballinger's Code, §§ 1986, 1987; Lord's Laws, §§ 2139, 2140.

19. Creating a bureau of mines and geology. Laws 1913, p. 632.

## SOUTH DAKOTA.

I. Laws Relating to the Size, Location, and Development of Mining Claims.

II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. LAWS RELATING TO THE SIZE, LOCATION, AND DEVELOPMENT OF MINING CLAIMS.

**Length of lode claim.**

§ 1. The length of any lode claim hereafter located within this state may equal, but shall not exceed, fifteen hundred feet along the vein or lode. Comp. Laws (1887), § 1997; Grantham's Annot. Stats. (1899), § 2656; Pol. Code 1903, § 2532.

The above section is but a re-enactment of the federal law.
Surface area, length, and width of lode claims discussed in text: § 361.
Location covering excessive area: § 362.

**Width of lode.**

§ 2. The width of lode claims shall be three hundred feet on each side of the center of the vein or crevice; provided, that any county may at any general election determine upon a less width than above specified, provided, that not less than twenty-five feet on each side of the vein or lode shall be prohibited. Comp. Laws (1887), § 1998; as amended, Laws 1899, ch. 115, p. 148; Grantham's Annot. Stats. (1899), § 2657; Pol. Code 1903, § 2533.

Section referred to and discussed in text: § 361.

**Location certificate and record—Register's certificate, posting.**

§ 3. The discoverer of a lode shall, within sixty days from the date of discovery, record his claim in the office of the register of deeds of the county in which such lode is situated, by a location certificate, which shall contain:

1. The name of the lode. 2. The name of the locator or locators. 3. The date of location. 4. The number of feet in length claimed on each side of the discovery shaft. 5. The number of feet in width claimed on each side of the vein or lode. 6. The general course of the lode, as near as may be. Comp. Laws 1887, § 1999; amended, Laws 1899, p. 146; Grantham's Annot. Stats. (1899), § 2658; Rev. Pol. Code 1903, § 2534; Amended Laws 1903, p. 268.

Section referred to in text: §§ 343, 380.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.

Effect of failure to comply with the law as to contents of certificates: § 385.

Time and place of record and effect of failure to record within time limited: §§ 389, 390.

**Location certificate—Effect of failure to comply with law as to contents.**

§ 4. Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the number of feet in width claimed, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void. Comp. Laws 1887, § 2000; Grantham's Annot. Stats. (1899), § 2659; Rev. Pol. Code 1903, § 2535.

Effect of failure to comply with law as to contents discussed: § 384.

**Discovery shaft—Posting notice.**

§ 5. Before filing such location certificate, the discoverer shall locate his claim by first sinking a discovery shaft thereon sufficient to show a well-defined mineral vein or lode, and not less than ten (10) feet in depth on the lower side;[1] second, by posting at the point of discovery, on the surface, a plain sign or notice containing the name of the lode, the name of the locator or locators, and the date of discovery, the number of feet claimed in length on either side of the discovery, and the number of feet in width claimed on each side of the lode;[2] third, by marking the surface boundaries of the claim. Comp. Laws 1887, § 2001; as amended, Laws 1899, p. 148; Grantham's Annot. Stats. (1899), § 2660; Rev. Pol. Code 1903, § 2536.

[1] Section referred to in text: §§ 343, 352.

Object of requirement as to development work: § 344.

Relationship of discovery shaft to discovery: § 345.

Extent of development work: § 346.

Can preliminary work required by state laws as an act of location be credited on first year's work? § 632.

[2] Place and manner of posting: § 356.

Liberal rules of construction applied to notices: § 355.

**Marking surface boundaries.**

§ 6. Such surface boundaries shall be marked by eight substantial posts, hewed or blazed on the side or sides facing the claim and plainly marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk in the ground, to wit: one at each corner, and one at the center of each side-line, and one at each end of the lode. When it is impracticable on account of rocks or precipitous ground to sink such posts, they may be placed in a monument of stone. Comp. Laws 1887, § 2002; Grantham's Annot. Stats. (1899), § 2661; Rev. Pol. Code 1903, § 2537.

Section referred to in text: § 374.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the federal law? § 373.
Perpetuation of monuments: § 375.

**Equivalent of discovery shaft.**

§ 7. Any open cut, at least ten-foot face, crosscut, or tunnel, at a depth sufficient to disclose the mineral vein or lode, or an adit, of at least ten feet in along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. Comp. Laws 1887, § 2003; as amended, Laws 1899, ch. 115, p. 148; Grantham's Annot. Stats. (1899), § 2662; Rev. Pol. Code 1903, § 2538.

Discovery shaft and equivalent discussed in text: §§ 343–346.

**Time within which discovery shaft must be completed.**

§ 8. The discoverer shall have sixty days from the time of uncovering or disclosing a lode, to sink a discovery shaft thereon. Comp. Laws 1887, § 2004; Grantham's Annot. Stats. (1899), § 2663; Rev. Pol. Code 1903, § 2539.

See note to preceding sections.

**Intralimital and extralateral right.**

§ 9. The location or location certificate of any lode claim shall be so construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth the top or apex of which lie inside of such lines extended vertically, with such parts of all lodes or ledges as continue by dip beyond the side-lines of the claim, but shall not include any portion of such lodes or ledges beyond the end-lines of the claim, or the end-lines continued, whether by dip or otherwise, or beyond the side-lines in any other manner than by the dip of the lode. Comp. Laws 1887, § 2005; Grantham's Annot. Stats. (1899), § 2664; Rev. Pol. Code 1903, § 2540.

Validity of legislation questioned: § 251.

**Lode not to be pursued on strike beyond end-lines.**

§ 10. If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior. Comp. Laws 1887, § 2006; Grantham's Annot. Stats. (1899), § 2665; Rev. Pol. Code 1903, § 2541.

Validity of state legislation of the character of above questioned: § 251.

**Amended location certificate—Change of boundaries.**

§ 11. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original cer-

tificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefit of this article, such locator or his assigns may file an additional certificate subject to the provisions of this article; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation; and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous locations. Comp. Laws 1887, § 2008; Grantham's Annot. Stats. (1899), § 2667; Rev. Pol. Code 1903, § 2543.

Objects and functions of amended certificates discussed: § 398.
Circumstances justifying change of boundaries: § 396.
Privilege of changing boundaries exists in the absence of intervening rights independent of state legislation: § 397.

**Relocation of abandoned lode claims.**

§ 12. The relocation of abandoned lode claims shall be by sinking a new discovery shaft, and fixing new boundaries in the same manner as if it were the location of a new claim, or the relocator may sink the original shaft, cut, or adit to a sufficient depth to comply with sections 2536 and 2538, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case, a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate must state that the whole or any part of the new location is located as abandoned property. Comp. Laws 1887, § 2010; Grantham's Annot. Stats. (1899), § 2669; Rev. Pol. Code 1903, § 2545.

Section referred to in text: § 408.
Circumstances under which relocations may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocations admit the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Right of second locator to improvements made by first: § 409.

**Annual labor.**

§ 13. The amount of work to be done or improvements made during each year, to hold possession of a mining claim, shall be that prescribed by the laws of the United States, to wit: one hundred dollars annually; provided, that the period within which the work required to be done annually on all unpatented claims so located, shall commence on the first day of January succeeding the date of location

of such claim. Comp. Laws 1887, § 2009; Grantham's Annot. Stats. (1899), § 2668; Rev. Pol. Code 1903, § 2544.

Requirement of above section the same as the federal law: § 623.
Subject of annual labor discussed: §§ 623–638.

**Location certificate must contain description of but one location.**

§ 14. No location certificate shall claim more than one location, whether the location be made by one or several locators; and if it purport to claim more than one location, it shall be absolutely void, except as to the first location therein described; and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all. Comp. Laws 1887, § 2011; Grantham's Annot. Stats. (1899), § 2670; Rev. Pol. Code 1903, § 2546.

Location certificate discussed: §§ 379–385.
Effect of failure to comply with law as to contents of certificate: § 384.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that the owner of the surface of any mining claim or the rightful occupant may demand security from the miner when the right to mine is separate from the right of occupancy of the surface. Comp. Laws 1887, § 2007; Grantham's Annot. Stats. (1899), § 2666; Rev. Pol. Code 1903, § 2542.

2. Regulating the fees of the recorder for recording location certificates, and for furnishing certified copies of the same. Comp. Laws 1887, § 2012; Grantham's Annot. Stats. (1899), § 2671; Rev. Pol. Code 1903, § 2547.

3. Providing that a miner shall have a lien on mines for work and labor done, or for material furnished, and providing for the collection of miners' wages when employed by other than the owner. Comp. Laws 1887, §§ 2039, 2040; Grantham's Annot. Stats. (1899), §§ 2697–2704; Rev. Pol. Code 1903, §§ 2573–2580; Amended Laws 1903, p. 212; Laws 1909, pp. 49–54.

4. Authorizing the court in actions involving the title or possession of mining claims to order, upon the application of any of the parties, a survey by a disinterested surveyor of the property in dispute. Comp. Laws 1887, § 2014; Grantham's Annot. Stats. (1899), § 2672; Rev. Pol. Code 1903, § 2548.

5. Authorizing circuit courts sitting in chancery to issue writs of injunction restoring persons to the possession of any mining property from which they have been ousted by force or fraud or during their temporary absence, or from which they are excluded by threats. Comp. Laws 1887, § 2015; Grantham's Annot. Stats. (1899), § 2678; Rev. Pol. Code 1903, § 2549.

6. Providing that owners of mining claims shall have right of way over lands of others for a road, ditch, or cut, flume, shaft, or tunnel, to their said claims, and prescribing the procedure for condemning the same. Comp. Laws 1887, §§ 2016–2028; Grantham's Annot. Stats. (1899), §§ 2674–2686; Rev. Pol. Code 1903, §§ 2550–2562.

7. Authorizing the use by persons owning mineral or agricultural lands of the waters of streams or creeks for mining, milling, agricultural, or domestic purposes, giving right of way to convey such waters to said lands, defining rights therein, and prescribing the method of appropriating the same. Comp. Laws 1887, §§ 2029–2038; Grantham's Annot. Stats. (1899), §§ 2687–2689; Rev. Pol. Code 1903, §§ 2563–2572.

8. Providing that the homestead laws shall not be construed to include any gold or silver mines, or gold or silver mill, or any mill, smelter, or machinery intended or used for the reduction or milling of gold or silver ores. Comp. Laws 1887, § 2465; Grantham's Annot. Stats. (1899), § 3380; Rev. Pol. Code 1903, § 3236.

9. Providing that evidence of local rules and customs shall be admitted in actions concerning mining claims, and if not in conflict with state or federal law, must govern the decision of the action. Comp. Laws 1887, § 5463; Grantham's Annot. Stats. (1899), § 6694; Rev. Code Civ. Proc. 1903, § 689.

10. Prescribing a penalty for conspiracy to obtain possession of mining claim by force and violence, threats, or stealth, or for intimidation of laborers on mining claim. Comp. Laws 1887, § 6926; Grantham's Annot. Stats. (1899), § 8191; Rev. Pen. Code 1903, § 759.

11. Providing that if the death of any person results from the entry or attempt to enter a mining claim in accordance with a conspiracy to enter by force of numbers, all persons so entering, or attempting to enter, are guilty of murder. Comp. Laws 1887, § 6448; Grantham's Annot. Stats. (1899), § 7707; Rev. Pen. Code 1903, § 252.

12. Providing that corporations may be formed for mining purposes. Comp. Laws 1887, § 2900; Grantham's Annot. Stats. (1899), § 3812; Rev. Civ. Code 1903, § 407; Rev. Civ. Code 1903, § 407.

13. Regulating the formation, conduct, and rights of mining and manufacturing corporations. Comp. Laws 1887, §§ 3108–3110, 3112–3125; Grantham's Annot. Stats. (1899), §§ 4208–4224; Rev. Civ. Code 1903, §§ 396–480.

14. Requiring all owners of mining claims before employing miners, carmen, or laborers thereon, to post on the property a true copy of all mortgages and encumbrances against said mining property, and prescribing penalty for violation. Laws 1899, ch. 114, p. 147.

15. Directing the legislature to provide that the science of mining and metallurgy be taught in at least one institution of learning under the patronage of the state. Const., art. xiv, § 5.

16. An act providing for the removal of unnecessary gases, fumes, and dust from smelters and dry-crushing works. Approved March 3, 1897, Laws 1897, p. 248; Grantham's Annot. Stats. (1899), §§ 2707–2711; Rev. Pol. Code 1903, §§ 2583–2585.

17. An act requiring mine owners to provide safety cages to be used in hoisting and lowering employees and other persons from or into the shaft. Laws 1897, p. 247; Grantham's Annot. Stats. (1899), §§ 2705–2706; Rev. Pol. Code of 1903, §§ 2581–2582.

18. An act creating the office of inspector of mines, and regulating the duties of the inspector. Laws 1890, p. 263; as amended, Laws 1899, p. 146; Rev. Pol. Code 1903, §§ 136–152, 2586.

19. Prohibiting the employment of children under fourteen years of age in mines. Rev. Pol. Code 1903, § 145.

20. Providing that mine inspector shall be notified of and ascertain the true cause of any serious or fatal accident in mines. Rev. Pol. Code 1903, § 143.

21. Establishing a mining experiment station at the state school of mines. Laws 1903, p. 209.

22. Providing a uniform system of ladder-ways and of bell signals for mines. Laws 1903, pp. 210, 211.

23. Providing that all redemptions from sales of unpatented mining claims under execution or mortgage foreclosure shall have cost of assessment work added. Laws 1903, p. 210.

24. Providing that the term of existence of mining and manufacturing corporations shall not exceed twenty-five years. Laws 1907, p. 154.

## UTAH.

I. Act of 1899 Providing for the Manner of Locating and Recording Quartz and Placer Mining Claims.

II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. ACT OF 1899, PROVIDING FOR THE MANNER OF LOCATING AND RECORDING QUARTZ AND PLACER MINING CLAIMS.

[Laws of 1899, p. 26.]

**Extent—No location to be made until discovery of vein.**

§ 1. A mining claim, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.[1] Any lode mining claim may extend three hundred feet on each side of the middle of the vein at the surface, except where adverse rights render a lesser width necessary.[2] The end-lines of each claim must be parallel. Comp. Laws 1907, § 1495.

[1] Discovery the source of miner's title: § 335.
What constitutes a valid discovery: § 336.
Where discovery must be made: § 337.
Effect of loss of discovery: § 338.
Extent of locator's rights after discovery and before completion of location: § 339.

[2] Surface area, length and width of lode claims: § 361.

**Monument—Notice of location.**

§ 2. The locator, at the time of making the discovery of such vein or lode, must erect a monument at the place of discovery, and post[1] thereon his notice of location, which notice shall contain:

1. The name of the lode or claim;

2. The name of the locator or locators;

3. The date of the location;

4. If a lode claim, the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein,[2] and the general course of the vein or lode as near as may be, and such a description of the claim, located by reference to some natural object or permanent monument,[3] as will identify the claim;

5. If a placer or millsite claim, the number of acres or superficial feet claimed, and such a description of the claim or millsite, located by reference to some natural object or permanent monument as will identify the claim or millsite.[4] Comp. Laws 1907, § 1496.

Referred to in text: § 380.
Liberal rules of construction applied to notices: § 355.
Purpose of location certificate: § 379.
Rules of construction applied to location certificates: § 381.
Effect of failure to comply with law as to contents of location certificate: § 384.
[1] Place and manner of posting: § 356.
[2] Length and width of lode claims: § 361.
[3] Variation between calls in certificate and monuments on the ground: § 382.
"Natural objects" and "permanent monuments": § 383.
[4] Referred to in text: §§ 442, 445.
Placer location certificates: § 459.
Placer location and its requirements: §§ 432, 433.

**Boundaries marked.**

§ 3. Mining claims and millsites must be distinctly marked on the ground so that the boundaries thereof can be readily traced. Comp. Laws 1907, § 1497.

Marking boundaries: §§ 371–375.
Placers: §§ 454–455.

**Recording notice with county recorder—Fee.**

§ 4. Within thirty days from the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, must file for record in the office of the county recorder of the county in which such claim is situated, if said claim be situated without and beyond an original mining district, a substantial copy of such notice of location. Such county recorder shall charge and collect a fee of fifty cents for first folio, and for each additional folio, twenty cents; and, providing further, that where more than two locators sign the said notice of location, an additional fee of ten cents shall be charged for each additional name; said fee shall be for filing, recording, indexing and abstracting such notice; provided, that such notice of location shall not be abstracted unless a subsequent conveyance affecting the same property be filed for record, when said notice shall be abstracted. Comp. Laws 1907, § 1498; Amended, 1909, p. 79.

[1] Recording notices of lode location: §§ 389–392.
Placer location certificate and its record: § 459.

**Notice of assessment work being done—Posting.**

§ 5. Every person or company owning a group of claims and doing the development or assessment work for said group at one point, shall post a notice upon each claim at the discovery monument, stating where such work is being done, and also post a notice at the entrance of the workings, where said work is done, stating the names of the claims for which the work is done. Comp. Laws 1907, § 1499.

**Annual labor—Recording affidavit of performance.**

§ 6. The owner of any quartz lode or placer mining claim who shall do or perform, or cause to be done or performed, the annual labor or improvements required by the laws of the United States,[1] in order to prevent a forfeiture of the claim, must within thirty days after the completion of such work or improvements file in the office of the county recorder in which the greater part of the mining district in which such claim is located is situated his affidavit, or an affidavit or affidavits of the person or persons who performed or directed such labor or made or directed such improvements, and shall file a duplicate thereof with the district mining recorder of the district in which said claim is situated, showing:—

1. The name of the claim and where situated;

2. The number of days' work done and the character and value of the improvements placed thereon;

3. The date or dates of performing said labor and making said improvements, and number of cubic feet of earth or rock removed;

4. At whose instance or request said work was done or improvements made;

5. The actual amount paid for said labor and improvements, and by whom paid, when the same was not done by the owner or owners of said claim.

Such affidavits or duly certified copies thereof shall be *prima facie* evidence of the facts therein stated. Comp. Laws 1907, § 1500.

Proof of annual labor: § 636.

No penalty attached for failure to file this affidavit. Murray Hill M. & M. Co. v. Havenor, 66 Pac. 762.

[1] Section referred to in text: § 626.

Federal laws concerning annual labor: Rev. Stats., § 2324. See *ante*, p. 2240.

Perpetuation of estate by annual development and improvement: §§ 623–628.

**Reorganization of mining districts.**

§ 7. Mining districts may be organized, and all existing districts may be reorganized and the rules and regulations of the said mining districts shall govern the said district according to the laws of the United States, in cases where a district organization is desired; provided, that the nearest boundary line of any mining district shall not be within ten miles from the county recorder's office of any county. Comp. Laws 1907, § 1501.

Manner of organizing districts: § 269.

**Copying records—Expense.**

§ 8. Upon application of the district mining recorder of any mining district to the board of county commissioners of the county having

in custody the records of the said mining districts, the said board of county commissioners shall cause the records of such districts to be copied by the county recorder and shall cause all records of documents pertaining to district mining records, recorded since June 4, 1896, up to the time of delivery, to be recorded in the original records of the mining district in which the property is situated, and the original records, when so amended, shall be delivered to such district mining recorder. The copy so made shall remain in the office of the county recorder, and shall be considered as the original record. One-half of the expense of copying such records shall be paid out of the county treasury, and one-half shall be paid out of the state treasury. Comp. Laws 1907, § 1502.

**Mining recorder to require duplicate notice—Fee—Penalty.**

§ 9. It shall be the duty of every district mining recorder to require every person depositing for record a notice of location to make a duplicate copy thereof, which copy said mining recorder shall carefully compare with the original and mark "duplicate," and indorse thereon his name, and the date and hour of filing in his office of the original. He shall, at the time of filing the duplicate notice with the original, collect, in addition to his own fee, the fee for the county recorder for recording such duplicate. Said fee to be computed at the rate of fifty cents for first folio, and for each additional folio, twenty cents; and, providing further, that where more than two locators sign the said notice of location, an additional fee of ten cents shall be charged for each additional name. He shall immediately deposit the duplicate copy with the county recorder of the county in which the greater part of the said mining district is located for record, or forward the same to him by mail or express, or in such other manner as will insure safe transit and delivery. The fee, computed as hereinbefore described, shall accompany the duplicate. The county recorder shall record said duplicate with the indorsements thereon for said fee. The record of said duplicate notice in the office of the county recorder shall be considered an original record. Every person neglecting or refusing to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding three hundred dollars or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment. Comp. Laws 1907, § 1503; Amended, 1909, p. 79.

**Copies of notices to be received as evidence.**

§ 10. Copies of notices of location of mining claims, millsites and tunnel-sites, heretofore recorded in the records of the several mining districts, and copies of the mining rules and regulations in force in

the several mining districts, in like manner recorded, heretofore duly certified by the mining recorder, shall be receivable in all tribunals and before all officers of this state as *prima facie* evidence. Comp. Laws 1907, § 1504.

**Certified copies by county recorder.**

§ 11. Where books, records, and documents pertaining to the office of district mining recorder have been or shall hereafter be deposited in the office of any county recorder in this state, such county recorder is authorized to make and certify copies therefrom, and such certified copies shall be receivable in all tribunals and before all officers of this state in the same manner and to the same effect as if such records had been originally filed or made in the office of the county recorder. Comp. Laws 1907, § 1505.

**County recorder to record rules—Certified copies.**

§ 12. It shall be the duty of each county recorder to record the mining rules and regulations of the several mining districts in his county without fee, and certified copies of such records shall be received in all tribunals and before all officers of this state as *prima facie* evidence of such rules and regulations, and it shall be his duty to record, index, and abstract all mining location notices presented for record, for a fee not to exceed seventy-five cents for each notice, and to file and index all affidavits of labor presented for filing affecting one mining claim, for a fee not to exceed twenty-five cents; provided, that when an affidavit of labor contains the name of more than one mining claim, an additional fee of ten cents shall be charged for each additional claim named therein. Comp. Laws 1907, § 1506.

**Recorder of mining district to give bond.**

§ 13. The recorder of each mining district shall take the oath of office and give bond, with sureties, in the penal sum of one thousand dollars. Such bond must be approved by the district judge and filed in the office of the county clerk of the county in which the greater part of the said mining district is located. Where the recorder of any mining district appoints a deputy, the recorder and his bondsmen shall be responsible for the official acts of such deputy. Comp. Laws 1907, § 1506x.

**District recorder to make copies.**

§ 14. It shall be the duty of the recorder of a mining district, upon request and payment or tender of the fees therefor, to make and deliver to any person requesting the same, duly certified copies of any records in his custody, and for a failure so to do, or for receiving larger fees for any such service than those provided, he shall be deemed guilty of a misdemeanor. Comp. Laws 1907, § 1506x1.

**Vacancy—County recorder to receive records.**

§ 15. Whenever there is a vacancy in the office of recorder of any mining district, or the person holding such office shall remove from the district, leaving therein no qualified successor in office, or whenever from any cause there is no person in such district authorized to retain the custody and give certified copies of the records, it shall be the duty of the person having custody of the records to deposit the same in the office of county recorder of the county in which such mining district or the greater part thereof is situated, and the county recorder shall receive such records, and is hereby authorized to make and certify copies therefrom, and such certified copies shall be received in evidence in all courts and before all officers and tribunals. The production of a certified copy so made shall be, without other proof, evidence that such records were properly in the custody of the county recorder. Comp. Laws 1907, § 1506x2.

**Fees of mining recorder.**

§ 16. Every mining recorder shall be allowed the same fees for recording and making copies of any record in his custody as are allowed by law to county recorders for similar services; provided, that fees for recording location notices may equal, but shall not exceed, one dollar for each notice. Comp. Laws 1907, § 990.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing a penalty for defacing notices or destroying monuments. Comp. Laws 1888, vol. ii, § 2791; Comp. Laws 1907, §§ 1535, 4430, 4436.

2. Providing penalty and measure of damages for wrongfully extracting ores. Comp. Laws 1907, § 1536.

3. Providing that a miner shall have a lien, for labor performed, upon the interest, right, and property in such mine. Comp. Laws 1907, § 1381.

4. Providing for a coal-mine inspector, prescribing his qualifications, duties, etc.; prescribing apparatus for, and regulating operation of, mines so as to conduce to the safety of the workmen. Laws 1901, pp. 83–92; Comp. Laws 1907, §§ 1507–1524; Amended, Laws 1911, p. 258 (§ 1523, repealed). Amended Laws 1913, p. 122.

5. Prohibiting the employment of women and children in mines. Const., art. xvi, § 3; Laws 1896, p. 106; Comp. Laws 1907, § 1338.

6. Limiting a day's labor to eight hours for workmen in mines and smelters. Const., art. xvi, § 6; Laws 1896, p. 154; Comp. Laws 1907, § 1337.

7. Prescribing the manner of weighing coal at mines, and providing penalty for fraudulent weighing, etc. Laws 1897, p. 34; Comp. Laws 1907, §§ 1529–1534; § 1533 repealed, Laws 1911, p. 258.

8. Declaring mining to be a public use, and providing that the right of eminent domain may be exercised in behalf thereof. Laws 1896, p. 316; Amended, 1901, p. 19; 1907, p. 143; Comp. Laws 1907, § 3588.

9. Requiring the fencing of shafts, the filling up or fencing of holes sunk in the surface of the public domain as a result of underground working, and providing a penalty for noncompliance. Comp. Laws 1907, §§ 1538–1540.

10. Mines, appurtenances, and net annual proceeds subjected to taxation. Const., art. xiii, § 4; Laws 1896, p. 424; Comp. Laws 1907, § 2504.

11. Prescribing manner of assessing the net proceeds of mines. Laws 1896, p. 442; Comp. Laws 1907, §§ 2566–2573; Amended, 1909, p. 92.

12. Exempting from execution miners' cabins under five hundred dollars in value and mine appurtenances within the same value limitation. Comp. Laws 1907, § 3245.

13. Local customs and rules are admissible as evidence in actions respecting mining claims, and control when not in conflict with state or federal laws. Comp. Laws 1907, § 3521.

14. Penalizing the salting of mines, fraudulent assaying, the changing of samples or assaying certificates, and the publishing of a false assay. Comp. Laws 1907, §§ 4399–4401.

15. The carrying away of gold-dust, amalgam, etc., the property of another, from claim, tunnel, sluice, etc., made a larceny. Comp. Laws 1907, § 4356.

16. Exempting mining corporations, where subscriptions for its stock are made in property, from the necessity of securing affidavits of valuation. Laws 1896, p. 299; Comp. Laws 1907, § 316.

17. Providing that the cause of action for underground waste or trespass upon a mining claim shall not be deemed to have accrued until the discovery thereof. Comp. Laws 1907, § 2877.

18. Providing for postponement of trial of action involving mining claim when it appears that further development of the mine is necessary to prepare for trial. Comp. Laws 1907, § 3134.

19. Providing for an order for survey in actions involving mining properties. Comp. Laws 1907, §§ 3515, 3516.

20. Establishing a state school of mines. Comp. Laws 1907, §§ 2320x–2320x3.

21. Providing that certain mines shall have fire protection. Laws 1901, p. 150; Comp. Laws 1907, § 1540x.

22. Requiring iron-bonneted safety cages for lowering and hoisting employees in mines having vertical shafts. Laws 1901, p. 151; Comp. Laws 1907, § 1540x1.

23. Regulating storage of powder in mines. Laws 1903, p. 8; Comp. Laws 1907, § 1518; amended, Laws 1911, p. 258.

24. Regulating quality of powder used in mines, and prohibiting mixing of different brands. Comp. Laws 1907, §§ 4280x3, 4280x4.

25. Requiring hospital supplies to be kept at mines. Laws 1907, p. 34; Comp. Laws 1907, §§ 1540x3, 1540x4.

26. Providing for the keeping of mining statistics. Comp. Laws 1907, §§ 2427x–2427x8.

27. Providing for lease and bond of mines belonging to estate of a deceased person. Comp. Laws 1907, §§ 3909x–3909x2. Amended to include estates of minors. Laws 1913, p. 107.

28. Regulating the drilling and operation of oil wells. Laws 1909, p. 268.

29. Establishing a mining and metallurgical research department in the Utah Engineering Experiment Station. Laws 1913, p. 199.

30. Providing that owners must make map of coal mine workings for inspector, and that notice of opening of new mines be given. Laws 1911, p. 259.

# WASHINGTON.

I. Laws Relating to Location of Mining Claims and Defining Locator's Rights and Duties.

A. Laws Antedating the Act of 1899.

B. Act of 1899, Providing for the Manner of Locating and Holding Lode and Placer Mining Claims.

II. Reference to Miscellaneous Legislation on Mining Subjects.

## I. LAWS RELATING TO LOCATION OF CLAIMS AND DEFINING LOCATOR'S RIGHTS AND DUTIES.

### A. Laws Antedating the Act of 1899.

**Length of lode claims governed by law in force at date of location.**

§ 1. All mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, or other valuable mineral deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of such location. Hill's Annot. Stats. & Codes of Wash., vol. i, § 2210; Ballinger's Annot. Codes & Stats. of Wash., § 3151; Rem. & Ballinger's Codes of 1909, § 7351.

See note to next paragraph.

**Length and width of lode claims—Discovery—End-lines.**

§ 2. A mining claim located upon any vein or lode of quartz or other rock in place, bearing gold, silver, or other valuable mineral deposits, after the approval of this act by the governor, whether located by one or more persons, may equal, but shall not exceed fifteen hundred feet in length along the vein or lode;[1] but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claims located.[2] No claims shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claims be limited by any mining regulation to less than fifty feet of surface on each side of the middle of such vein or lode, at the surface, excepting where adverse rights, existing at the date of the approval of this act, shall make such limitation necessary.[3] The end-lines of such claim shall be parallel to each other.[4] Hill's Annot. Stats. & Codes, vol. i, § 2211; Ballinger's Annot. Codes & Stats., § 3152; Rem. & Ballinger's Codes of 1909, § 7352.

[1] Surface area, length, and width of location: § 361.

[2] Discovery the source of miners' title: § 335.
What constitutes valid discovery: § 336.

Where such discovery must be made: § 337.
Effect of loss of discovery upon remainder of location: § 338.
Extent of locator's rights after discovery and prior to completion of location: § 339.
[3] Width of claims: § 361.
[4] End-lines: §§ 365, 582.

**Extent of locator's rights—Intralimital—Extralateral.**

§ 3. The locators of all mining locations heretofore made or hereafter made under the provisions of this act, on any mineral vein, lode, or ledge on the public domain, and their heirs and assigns, so long as they comply with the laws of the United States and the state and local laws relating thereto, shall have the exclusive right to the possession and enjoyment of all surface included within the lines of their location, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies within the surface lines of such location, extending downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward as to extend outside of the vertical side line of said surface location. Hill's Annot. Codes & Stats., vol. i, § 2212; Ballinger's Annot. Codes & Stats., § 3153; Rem. & Ballinger's Codes of 1909, § 7353.

This subject is not within the permissive scope of state legislation: § 251.

**Annual work, amount and time of performance.**

§ 4. In order to hold the possessory right to a location of a mine not less than one hundred dollars' worth of work must be performed or improvements made thereon annually; provided, that the period within which the work required to be done annually on all unpatented claims so located shall commence on the first day of January succeeding the date of location of such claim. Laws 1888, p. 161; Hill's Annot. Codes & Stats., vol. i, § 2213; Laws 1893, p. 75, § 1; Ballinger's Annot. Codes & Stats., § 3154; Rem. & Ballinger's Codes of 1909, § 7354.

This statute commented on in text: § 626.
Annual labor discussed: §§ 623–637.
Provisions of federal law as to amount of annual work and time within which first year's work must be done: § 623.
Relocation discussed: §§ 402–409.

**District recorder and district records.**

§ 5. The miners of each mining district may elect a recorder of said district. When so elected such recorder shall provide books of record, in which it shall be his duty to record all notices of locations or transfers, bonds, conveyances, or assignments of mining claims within his district when the same shall be presented to him for record. Such records are hereby declared to be public records, open to inspec-

tion, and shall have the same force and effect, so far as notice is concerned, as the records of deeds and mortgages in this state. Hill's Annot. Codes & Stats., vol. i, § 2214; Ballinger's Annot. Codes & Stats., § 3155; Rem. & Ballinger's Codes of 1909, § 7355.

Local regulations concerning records of mining claims: § 273.
See next paragraph and note.

**Records of locations, deeds, and transfers.**

§ 6. Inasmuch as the last two preceding sections of this chapter leave the election of a recorder for a mining district optional with the miners thereof, all location notices,[1] bonds, assignments, and transfers of mining claims shall be recorded in the office of the county auditor of the county where the same is situated, within thirty days after the execution thereof; provided, that all records of mining claims and of assignments, deeds, bonds, and transfers heretofore made by any recorder of any mining district, or by any county auditor, are hereby declared to be valid and to have the same force and effect as records made in pursuance of the provisions of this act. Hill's Annot. Codes & Stats., vol. i, § 2216; Ballinger's Annot. Codes & Stats., § 3157; Rem. & Ballinger's Codes of 1909, § 7357.

[1] Time and place of record: § 389.
Effect of failure to record within the limited time: § 390.
Proof of record: § 391.
The record as evidence: § 392.

B. Act of 1899, Providing for the Manner of Locating and Holding Lode and Placer Mining Claims.

[Approved March 8, 1899 (Laws of 1899, p. 69).]

**Location notice—Contents—Record.**

§ 1. The discoverer of a lode shall, within ninety (90) days from the date of discovery, record in the office of the auditor of the county in which such lode is found, a notice containing the name or names of the locators, the date of the location, the number of feet in length claimed on each side of the discovery, the general course of the lode, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7358.

Referred to in text: § 380.
Variation between calls in certificate and monuments on the ground: § 382.
Natural objects and permanent monuments: § 383.
Purpose of location certificate: § 379.
Rules of construction applied to location certificates: § 381.
Effect of failure to comply with law as to contents of certificate: § 384.

**Development work—Posting notice of location—Marking boundaries.**

§ 2. Before filing such notice for record the discoverer shall locate his claim by first sinking a discovery shaft upon the lode, to the depth of ten (10) feet from the lowest part of the rim of such shaft at the surface,[1] and shall post at the discovery[2] at the time of discovery a notice containing the name of the lode, the name of the locator or locators, and the date of discovery,[3] and shall mark the surface boundaries of the claim by placing substantial posts or stone monuments bearing the name of the lode and date of location; one post or monument must appear at each corner of such claim; such posts or monuments must be not less than three (3) feet high; if posts are used they shall not be less than four inches in diameter, and shall be set in the ground in a substantial manner. If any such claim be located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees be marked or blazed along the lines of such claim to indicate the location of such lines.[4] Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7359.

[1] Discovery shaft and its equivalent: §§ 343–346.
[2] Place and manner of posting notice: § 356.
[3] Liberal rules of construction applied to notices: § 355.
[4] Marking boundaries: §§ 371–375.

**Discovery shafts, equivalent of.**

§ 3. Any open cut or tunnel having a length of ten (10) feet, which shall cut a lode at the depth of ten (10) feet below the surface, shall hold such lode the same as if a discovery shaft were sunk thereon, and shall be equivalent thereto. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7360.

Referred to in text: §§ 343–346.

**"Lode," definition of.**

§ 4. The term "lode" as used in this act shall be construed to mean ledge, vein, or deposit. Rem. & Ballinger's Codes of 1909, § 7361.

"Lode," "vein," "ledge": §§ 286–294.
Terms legal equivalents: § 290.

**Amended certificate of location.**

§ 5. If at any time the locator of any quartz or lode mining claim heretofore or hereafter located, or his assigns, shall learn that his original certificate was defective, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries or of taking in any additional ground which is subject to location, or in any case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file

an amended certificate of location, subject to the provisions of this act regarding the making of new locations. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7362.

Objects and functions of amended certificate: § 398.

**Annual labor, affidavit of—Recording.**

§ 6. Within thirty (30) days after the expiration of the period of time fixed for the performance of annual labor or the making of improvements upon any quartz or lode mining claim or premises,[1] the person in whose behalf such work or improvement was made, or some person for him knowing the facts, shall make and record in the office of the county auditor of the county wherein such claims are situate an affidavit or oath of labor performed on such claim. Such affidavit shall state the exact amount and kind of labor, including the number of feet of shaft, tunnel, or open cut made on such claim, or any other kind of improvements allowed by law or by rules of mining districts made thereon. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7363.

Proof of annual labor: § 636.

[1] Federal law concerning annual labor: Rev. Stats., § 2324. See *ante.* p. 2240.

Section referred to in text: § 626.

Perpetuation of estate by annual development and improvement: §§ 623–638.

**Affidavit of annual labor—Effect as evidence.**

§ 7. Such affidavit, when so recorded, shall be *prima facie* evidence of the performance of such labor or the making of such improvements, and such original affidavit, after it has been recorded, or a certified copy of record of same, shall be received as evidence accordingly by all the courts of this state. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7364.

See text, § 636.

**Abandoned or forfeited claims, relocation of.**

§ 8. The relocation of forfeited or abandoned quartz or lode claims shall only be made by sinking a new discovery shaft and fixing new boundaries in the same manner and to the same extent as is required in making a new location; or the relocator may sink the original discovery shaft ten feet deeper than it was at the date of commencement of such relocation, and shall erect new, or make the old monuments the same as originally required; in either case a new location monument shall be erected, and the location certificate shall state if the whole or any part of the new location is located as abandoned property. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7365.

Relocation of forfeited or abandoned claims: §§ 402–409.

**Discovery shafts not required west of Cascade mountains.**

§ 9. The provision herein relating to discovery shafts shall not apply to any mining location west of the summit of the Cascade mountains. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7366.

**Placers—Location—Location notice, posting, contents, recording—Marking boundaries—Development work, affidavit of.**

§ 10. The discoverer of placers or other forms of deposits subject to location and appropriation under mining laws applicable to placers shall locate his claim in the following manner:—

*First*, he must immediately post in a conspicuous place at the point of discovery thereon, a notice or certificate of location thereof, containing (a) the name of the claim; (b) the name of the locator or locators; (c) the date of discovery and posting of the notice hereinbefore provided for, which shall be considered as the date of the location; (d) a description of the claim by reference to legal subdivisions of sections, if the location is made in conformity with the public surveys; otherwise, a description with reference to some natural object or permanent monuments as will identify the claim; and where such claim is located by legal subdivisions of the public surveys, such location shall, notwithstanding that fact, be marked by the locator upon the ground the same as other locations.

*Second*, within thirty (30) days from the date of such discovery he must record such notice or certificate of location in the office of the auditor of the county in which such discovery is made, and so distinctly mark his location on the ground that its boundaries may be readily traced.

*Third*, within sixty (60) days from the date of discovery the discoverer shall perform labor upon such location or claim in developing the same to an amount which shall be equivalent in the aggregate to at least ten (10) dollars' worth of such labor for each twenty acres or fractional part thereof contained in such location or claim; provided, however, that nothing in this subdivision shall be held to apply to lands located under the laws of the United States as placer claims for the purpose of the development of petroleum and natural gas and other natural oil products.

*Fourth*, such locator shall upon the performance of such labor, file with the auditor of the county an affidavit showing such performance and generally the nature and kind of work so done. As amended, Laws 1901, p. 292; Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7367.

Placer location certificate and its record: § 459.
Marking boundaries: §§ 454, 455.
Section referred to in text: §§ 442, 445.
Placer location and its requirements: §§ 432, 433.

**Placers—Affidavit of development work and notice of location, effect of as evidence—Annual labor, affidavit of, effect as evidence.**

§ 11. The affidavit provided for in the last section, and the aforesaid placer notice or certificate of location when filed for record, shall be *prima facie* evidence of the facts therein recited. A copy of such certificate, notice, or affidavit, certified by the county auditor, shall be admitted in evidence in all actions or proceedings with the same effect as the original, and the provisions of sections 7363 and 7364 shall apply to placer claims as well as lode claims. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7368.

**All future locations must conform to this act.**

§ 12. All locations of quartz or placer formations or deposits hereafter made shall conform to the requirements of this act in so far as the same are respectively applicable thereto. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7369.

**Mining district—Rules and regulations.**

§ 13. Any mining district organized in the state of Washington in accordance with the laws of the United States shall have power to make rules and regulations for such mining district, providing such rules and regulations do not conflict with the laws of the state of Washington or of the United States. Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7370.

Local district regulations: §§ 268–275.

**Mining districts—Power to apply road-building on assessment work.**

§ 14. Any mining district shall have the power to make road building to mining claims within such district applicable as assessment work or improvement upon such claims; provided, that rules pertaining to such road-building shall be made only at a public meeting of the miners of such district regularly called by the mining recorder of such district; provided further, that such meeting shall be attended by at least twelve (12) property-holders of such district, and that no such rule can be made without the assent of the majority of the property-holders of such district who are present at such meeting. Such meeting to designate where, when, and how such road work shall be done and shall designate some one of their number who shall superintend such road building or construction, and who shall receipt for such labor to the performer thereof, such receipts to be filed with the county auditor of the county in which such work is performed by the holder or holders of such receipts, and shall be received as *prima facie* evidence of labor performed as annual assessment work upon such claim or claims as may be designated by an affidavit or oath of labor as provided for in section 7363; pro-

vided, that nothing in this act can be construed as being mandatory upon any owner or holder of mining property to perform labor upon any such road. Laws 1899, p. 69; Ballinger's Supp. of 1901–3, § 3151a; Rem. & Ballinger's Codes of 1909, § 7371.

## II. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Defining the duties of the district recorder, and regulating his fees. Hill's Annot. Codes & Stats., vol. i, § 2215; Ballinger's Annot. Codes & Stats., § 3156; Rem. & Ballinger's Codes of 1909, § 7356.

2. Providing for the protection of persons working in coal mines. Hill's Annot. Codes & Stats., vol. i, §§ 2217, 2244; Laws 1897, pp. 58–62; Ballinger's Annot. Codes & Stat., §§ 3158–3185; amended, Laws of 1907, p. 130; Rem. & Ballinger's Codes of 1909, §§ 7372–7407.

3. Relating to oil wells, salt wells, etc. Hill's Annot. Codes & Stats., vol. i, §§ 2246–2262; Ballinger's Annot. Codes & Stats., §§ 3195–3211; Rem. & Ballinger's Codes of 1909, §§ 7417–7433.

4. Providing protection against accidents from open shafts. Hill's Annot. Codes & Stats., vol. i, §§ 2263–2271; Ballinger's Annot. Codes & Stats., §§ 3186–3194; Rem. & Ballinger's Codes of 1909, §§ 7408–7416.

5. Extending the right of eminent domain to mining, milling, and reduction works companies. Laws 1897, p. 95; Ballinger's Annot. Codes & Stats., § 4282; Rem. & Ballinger's Codes of 1909, §§ 7344–7346.

6. Regulating the method of assessing mining property. Laws of 1897, p. 155; Ballinger's Annot. Codes & Stats., § 1698; Rem. & Ballinger's Codes of 1909, § 9112.

7. Providing a punishment for destroying, defacing, or mutilating notices and monuments upon mining claims. Laws 1897, p. 221; Ballinger's Annot. Codes & Stats., § 7146a; Rem. & Ballinger's Codes of 1909, § 2656.

8. Regulating the leasing of mineral lands belonging to the state. Laws 1897, p. 293; Ballinger's Annot. Codes & Stats., §§ 2212–2218; as amended, Laws 1899, p. 337; Laws 1901, p. 314; Rem. & Ballinger's Codes of 1909, §§ 6782–6798.

9. Making it a misdemeanor to dig, quarry, take, or remove any mineral, earth, or stone from state lands, except by contract with the state. Laws 1899, p. 47; Rem. & Ballinger's Codes of 1909, § 6824.

10. Providing that Indians may, with the consent of congress, convey any stone, mineral, or petroleum contained on land owned by them, or the fee thereof. Laws 1899, p. 155; Rem. & Ballinger's Codes of 1909, § 8780.

11. Providing for condemnation proceedings for right of way for ditches, canals, and flumes for agricultural and mining purposes, and relating to the right of appropriation of water. Laws 1899, p. 261; Rem. & Ballinger's Codes of 1909, §§ 7344–7346, 6316–6326.

12. Authorizing and regulating the leasing of petroleum and natural gas lands belonging to the state. In effect March 10, 1901, Laws 1901, p. 218; Rem. & Ballinger's Codes of 1909, §§ 6791–6798.

13. Establishing a state geological survey and repealing act creating mining bureau; also, repealing act creating office of state geologist. Laws 1901, p. 334; Rem. & Ballinger's Codes of 1909, §§ 5396–5403.

14. Leasing of state mineral lands. Rem. & Ballinger's Codes of 1909, §§ 6782–6790.

15. Granting right to appropriate water for mining purposes, and to construct ditches, etc., to convey it to mine, on paying compensation to persons injured thereby. Laws 1879, p. 124, § 1; Hill's Annot. Codes, vol. i, § 1589; Ballinger's Annot. Codes & Stats., § 4281; Rem. & Ballinger's Codes of 1909, §§ 6316–6329, 9509, 9510.

16. Establishing a cubic foot of water per second as the unit of measure of water for mining and milling purposes. Laws 1890, p. 729, § 1; Hill's Annot. Codes, vol. i, § 1862; Ballinger's Annot. Codes & Stats., § 4090; Rem. & Ballinger's Codes of 1909, § 6315.

17. Protecting mining rights from impairment by the effect of the laws relating to irrigation districts. Laws 1890, p. 693, § 1; Hill's Annot. Codes, vol. i, § 1828; Ballinger's Annot. Codes & Stats., § 4210; Rem. & Ballinger's Codes of 1909, § 6460.

18. Providing a penalty for trespassing on mines or mining claims. Laws 1890, p. 126; Hill's Annot. P. C., vol. ii, § 79; Ballinger's Annot. Codes & Stats., § 7146.

19. Prescribing a penalty for "salting" mines, interfering with or changing samples or assays of ore or bullion, or making or publishing false samples of ore or bullion. Laws 1890, p. 99, §§ 1–4; Hill's Annot. P. C., §§ 238–241; Ballinger's Annot. Codes & Stats., §§ 7169–7172; Rem. & Ballinger's Codes of 1909, §§ 2711–2714.

20. Providing that county commissioners acquiring mining claims through nonpayment of taxes may lease or sell the same. Laws 1907, p. 53; Rem. & Ballinger's Codes of 1909, § 9274.

21. Mineral veins within townsite. Rem. & Ballinger's Codes of 1909, § 9472.

22. Reserving the rights to minerals, oils, gases, coal, and ores, together with right to extract the same, to the state and its assigns, in all sales of state lands made subsequent to this date. Laws 1907, p. 749; Rem. & Ballinger's Codes of 1909, § 6675.

23. Enacting an eight-hour day for coal miners. Laws 1909, p. 749; Rem. & Ballinger's Codes of 1909, § 6583.

24. Regulating the use of powder and other explosives in coal mines. Laws 1911, p. 336.

25. Creation of a commission to revise the coal mining laws and report to legislature. Laws 1911, p. 619.

26. Employer's liability act. Laws 1911, p. 345.

## WYOMING.

I. Laws Relating to the Location of Lode Claims and the Extent of Locator's Rights Therein.

II. Laws Relating to the Location and Annual Development of Placer Claims.

III. Reference to Miscellaneous Legislation on Mining Subjects.

### I. LAWS RELATING TO THE LOCATION OF LODE CLAIMS, AND EXTENT OF LOCATOR'S RIGHTS THEREIN.

**Length of lode claim.**

§ 1. The length of any lode mining claim located within Wyoming shall not exceed fifteen hundred feet measured horizontally along such lode or vein. Nor can the regulations of any mining district limit a locator to less than this length. Laws 1888, p. 87, § 13; Rev. Stats. 1899, § 2544; Comp. Stats. 1910, § 3465.

Length of lode claims discussed in text: § 361.

**Width of lode claim.**

§ 2. The width of any lode claim located within Wyoming shall not exceed three hundred feet on each side of the discovery shaft, the discovery shaft being always equally distant from the side-lines of the claims. Nor can any mining district limit the locator to a width of less than one hundred and fifty feet on either side of the discovery shaft. Laws 1888, p. 87, § 14; Rev. Stats. 1899, § 2545; Comp. Stats. 1910, § 3466.

Width discussed in text: § 361.

**Extent of locators' rights—Extralateral—Intralimital.**

§ 3. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such

planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize a locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. Laws 1888, p. 89, § 20; Rev. Stats. 1899, § 2551; Comp. Stats. 1910, § 3472.

Validity of legislation of character of above questioned: § 251.

**Discovery shaft—Posting notice—Marking boundaries.**

§ 4. Before the filing of a location certificate in the office of the county clerk and *ex-officio* register of deeds, the discoverer of any lode, vein, or fissure, shall designate the location thereof as follows:—

1. By sinking a shaft upon the discovery lode or fissure to the depth of ten feet from the lowest part of the rim of such shaft at the surface;[1]

2. By posting at the point of discovery, on the surface, a plain sign or notice, containing the name of the lode or claim, the name of the discoverer, and locator, and date of such discovery;[2]

3. By marking the surface boundaries of the claim, which shall be marked by six substantial monuments of stone or posts hewed or marked on the side or sides which face is toward the claim, and sunk in the ground, one at each corner, and one at the center of each side line, and when thus marking the boundaries of a claim, if any one or more of such posts or monuments of stone shall fall, by necessity, upon precipitous ground, when the proper placing of it is impracticable or dangerous to life or limb, it shall be lawful to place any such post or monument of stone at the nearest point, properly marked to designate its right place; provided, that no right to such lode or claim, or its possession or enjoyment, shall be given to any person or persons unless such person or persons shall discover in said claim mineral-bearing rock in place.[3] Laws 1888, p. 88, § 17; Rev. Stats. 1899, § 2548; Comp. Stats. 1910, § 3469.

[1] Reference to section in text: § 343.
Objection of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346.
Can preliminary development work be credited on first year's labor? § 632.

[2] Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.

[3] Time allowed for marking: § 372.
Necessity for and object of marking: § 371.
Perpetuation of monuments: §§ 374, 375.

**Equivalent of discovery shaft.**

§ 5. Any open cut which shall cut the vein ten feet in length and with face ten feet in height, or any crosscut tunnel, or tunnel on

the vein ten feet in length which shall cut the vein ten feet below the surface, measured from the bottom of such tunnel, shall hold such lode the same as if a discovery shaft were sunk thereon. Laws 1888, p. 88, § 18; Rev. Stats. 1899, § 2549; Comp. Stats. 1910, § 3470.

Discovery shaft and its equivalent discussed: §§ 343–346.

**Time within which discovery shaft must be sunk.**

§ 6. The discoverer of any mineral lode or vein in this state shall have the period of sixty days from the date of discovering such lode, or vein, in which to sink a discovery shaft thereon. Laws 1888, p. 88, § 19; as amended, Laws 1890–91, p. 180, § 12; as amended, Laws 1895, ch. 108, § 2; Rev. Stats. 1899, § 2550; Comp. Stats. 1910, § 3471.

See text, §§ 343–346.

**Location certificate—Contents and record.**

§ 7. A discoverer of any mineral lead, lode, ledge, or vein shall within sixty days from date of discovery, cause such claim to be recorded in the office of the county clerk and *ex-officio* register of deeds of the county within which such claim may exist, by a location certificate which shall contain the following facts:—

1. The name of the lode claim. 2. The name or names of the locator or locators. 3. The date of location. 4. The length of the claim along the vein measured each way from the center of the discovery shaft and the general course of the vein, as far as it is known. 5. The amount of surface ground claimed on either side of the center of the discovery shaft or discovery workings. 6. A description of the claim by such designation of natural or fixed objects, or if upon ground surveyed by the United States system of land surveys, by reference to section or quarter-section corners, as shall identify the claim beyond question. Laws 1888, p. 87, § 15; as amended, Laws 1890–91, p. 179, § 1; as amended, Laws 1895, ch. 108, § 1; Rev. Stats. 1899, § 2546; Comp. Stats. 1910, § 3467.

Purpose of location certificate: § 380.
Rules of construction applied: § 381.
Requirements of federal law as to contents of certificate: § 385.
Time and place of record and effect of failure to record within time limited: §§ 389, 390.

**Location certificate void unless containing proper elements.**

§ 8. Any certificate of the location of a lode claim which shall not fully contain all the requirements named in the preceding section, together with such other description as shall identify the lode or claim with reasonable certainty, shall be void. Laws 1888, p. 88, § 16; Rev. Stats. 1899, § 2547; Comp. Stats. 1910, § 3468.

Effect of failure to comply with the law as to contents of certificate: § 384.

**Location certificate must contain one location or claim.**

§ 9. No location certificate shall contain more than one claim or location, whether the location be made by one or more locators, and any location certificate that contains upon its face more than one location claim shall be absolutely void, except as to the first location named and described therein, and in case more than one claim or location is described together so that the first one cannot be distinguished from the others, the certificate of location shall be void as an entirety. Laws 1888, p. 85, § 8; Rev. Stats. 1899, § 2539; Comp. Stats. 1910, § 3460.

**Amended location certificate—Change of surface boundaries.**

§ 10. Whenever it shall be apprehended by the locator, or his assigns, of any mining claims or property heretofore or hereafter located, that his or their original location certificate was defective, erroneous, or that the requirements of the law had not been complied with before the filing thereof, or shall be desirous of changing the surface boundaries of his or their original claim or location, or of taking in any part of an overlapping claim or location which has been abandoned, or in case the original certificate was made prior to March 6, 1888, and he or they shall be desirous of securing the benefit of this law, such locator or locators, or his or their assigns, may file an additional location certificate in compliance with and subject to the provisions of this chapter; provided, however, that such relocation shall not infringe upon the rights of others existing at the time of such relocation, and that no such relocation, or other record thereof, shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under any previous location. Laws 1888, p. 85, § 7; Rev. Stats. 1899, § 2538; Comp. Stats. 1910, § 3459.

Objects and functions of amended certificates: § 398.
Circumstances justifying change of boundaries: § 396.
Privilege of changing boundaries exists in absence of intervening rights independent of state legislation: § 397.

**Relocation of abandoned claim.**

§ 11. Any abandoned lode, vein, or strata may be relocated, and such relocation shall be perfected by sinking a new discovery shaft and by fixing new boundaries in the same manner as provided for the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of its abandonment, and erect new or adopt the old boundaries, renewing the posts or monuments of stone if removed or destroyed. In either event, a new location stake shall be fixed. The location certificate of an abandoned claim may state that the whole or any part of the new

location is located as an abandoned claim. Laws 1888, p. 89, § 21; Rev. Stats. 1899, § 2552; Comp. Stats. 1910, § 3473.

Circumstances under which relocation may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Right of second locator to improvements made by first: § 409.

## II. LAWS RELATING TO LOCATION AND ANNUAL DEVELOPMENT OF PLACER CLAIMS.

**Placer claims—Location certificate and record—Posting—Marking boundaries.**

§ 1. Hereafter the discoverer of any placer claim shall, within ninety days after the date of discovery, cause such claim to be recorded in the office of the county clerk and *ex-officio* register of deeds of the county within which such claim may exist, by filing therein a location certificate, which shall contain the following:—

1. The name of the claim, designating it as a placer claim.

2. The name or names of the locator or locators thereof.

3. The date of location.

4. The number of feet or acres thus claimed.

5. A description of the claim by such designation of natural or fixed objects as shall identify the claim beyond question.[1] Before filing such location certificate, the discoverer shall locate his claim: First, by securely fixing upon such claim a notice in plain, painted, printed, or written letters, containing the name of the claim, the name of the locator or locators, the date of the discovery, and the number of feet or acres claimed.[2] Second, by designating the surface boundaries by substantial posts or stone monuments at each corner of the claim.[3] Laws 1888, pp. 89, 90, § 22; Rev. Stats. 1899, § 2553; as amended, Laws 1901, p. 104; Comp. Stats. 1910, § 3474.

[1] Location certificates: § 459.
Object of location certificate: § 379.
Rules of construction: § 381.
Effect of failure to comply with law as to contents: § 384.
[2] Posting notices on placers: § 442.
[3] Marking boundaries of places: §§ 454, 455.

**Placers—Annual labor—Character of.**

§ 2. For every placer claim, assessment work as hereinafter provided shall be done during each and every calendar year after the first day of January following the date of location. Such assessment

work shall consist in manual labor, permanent improvements made on the claim in buildings, roads, or ditches made for the benefit of working such claims, or after any manner, so long as the work done accrues to the improvement of the claim, or shows good faith and intention on the part of the owner or owners, and their intention to hold possession of said claim. Rev. Stats. 1899, § 2554; Comp. Stats. 1910, § 3475.

**Same—Amount of—Time of performance.**

§ 3. On all placer claims heretofore or hereafter located in this state not less than one hundred dollars' worth of assessment work shall be performed during each calendar year, from the first day of January after the date of location. Rev. Stats. 1899, § 2555; as amended, Laws 1901, p. 105, § 2; Comp. Stats. 1910, § 3476.

**Same—Contiguous claims in common ownership.**

§ 4. When two or more placer mining claims lie contiguous and are owned by the same person, persons, company, or corporation, the yearly expenditure of labor and improvements required on each of such claims may be made upon any one of such contiguous claims if the owner or owners shall thus prefer. Rev. Stats. 1899, § 2556; Comp. Stats. 1910, § 3477.

**Same—Failure to perform forfeits claim.**

§ 5. Upon failure of the owners to do or have done the assessment work required within the time above stated, such claim or claims upon which such work has not been completed shall thereafter be open to relocation on or after the first day of January of any year after such labor or improvements should have been done, in the same manner and on the same terms as if no location thereof had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon such claim or claims after failure, and before any subsequent location has been made. Rev. Stats. 1899, § 2558; Comp. Stats. 1910, § 3478.

**Same—Affidavit of performance—Record.**

§ 6. Upon completion of the required assessment work for any mining claim, the owner or owners or agent of such owner or owners shall cause to be made by some person cognizant of the facts, an affidavit setting forth that the required amount of work was done, which affidavit shall within sixty days of the completion of the work, be filed for record, and shall thereafter be recorded in the office of the county clerk and *ex-officio* register of deeds of the county in which the said claim is located. Laws 1888, pp. 90, 91, § 23; Rev. Stats. 1899, § 2559; as amended, Laws 1901, p. 105, § 3; Comp. Stats. 1910, § 3479.

Annual labor upon placers: § 625.
Requirement as to annual labor imperative: § 624.
Work done within the limits of a group of claims in furtherance of a common system of development: § 630.
Period within which work must be done: § 632.
By whom labor must be performed: § 633.
Proof of annual labor: § 636.

**Amount of annual labor to be performed before issuance of patent.**

§ 7. When any person, persons, or association, they and their grantors, have held and worked their placer claims in conformance with the laws of this state and the regulations of the mining district in which such claim exists, if such be organized, for five successive years after the first day of January succeeding the date of location, then such person, persons, or association, they and their grantors, shall be entitled to proceed to obtain a patent for their claims from the United States without performing further work; but where such person, persons, or association, they or their grantors, desire to obtain a United States patent before the expiration of five years from the date hereinbefore mentioned, they shall be required to expend at least five hundred dollars' worth of work upon a placer claim. Laws 1888, p. 91, § 24; Rev. Stats. 1899, § 2560; Comp. Stats. 1910, § 3480.

States and territories may not dictate terms upon which patent may be obtained (see § 249), nor suspend the requirement of federal law as to performance of annual labor: § 637.
That obligation to perform annual labor ceases with final entry at the land office, see § 637.
Proof of annual labor before land office: § 686.

## III. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

1. Providing that a miner who, at the request of the owner has performed work upon a mine, or a person who has furnished material for the mine shall have a lien upon the same. Rev. Laws 1887, §§ 1486–1493; amended, Laws 1897, chs. 62–64; Rev. Stats. 1899, §§ 2868–2888; Comp. Stats. 1910, §§ 3778–3798.

2. Providing for the organization of mining districts, the election of a recorder, the passing of resolutions and the transfer of a copy of all papers to the office of the recorder of deeds of the county. Laws 1888, p. 83, §§ 1–3; Rev. Stats. 1899, §§ 2533, 2534; Comp. Stats. 1910, §§ 3454, 3455.

3. Providing for the drainage of mines already opened. Laws 1888, p. 84, § 4; Rev. Stats. 1899, § 2535; Comp. Stats. 1910, § 3456.

4. Providing for rights of way for ditches, flumes, and tramways. Laws 1888, p. 84, § 5; Rev. Stats. 1899, § 2536; Comp. Stats. 1910, § 3457.

5. Providing that the surface owner or occupant of land containing mineral shall have the right to exact security from the mine owner or operator extracting ore from beneath the surface. Laws 1888, p. 85, § 6; Rev. Stats. 1899, § 2537; Comp. Stats. 1910, § 3458.

6. Providing punishment for conspiring to obtain possession of mining property. Laws 1886, p. 85, § 9; Rev. Stats. 1899, § 2540; Comp. Stats. 1910, § 3461.

7. Providing punishment for mutilating or destroying notices or monuments upon mines. Laws 1888, p. 86, § 10; Rev. Stats. 1899, § 2541; Comp. Stats. 1910, § 3462.

8. Providing punishment for "salting" ores. Laws 1888, p. 86, § 11; Rev. Stats. 1899, § 2542; Comp. Stats. 1910, § 3463.

9. Protecting livestock by requiring openings to be covered. Laws 1888, p. 87, § 12; Rev. Stats. 1899, § 2543; Comp. Stats. 1910, § 3464.

10. Providing for the payment of coal miners and mine laborers semi-monthly, and in lawful money. Laws 1890–91, p. 356; Rev. Stats. 1899, §§ 2590–2593; Amended 1903, p. 71; Comp. Stats. 1910, §§ 3549–3552.

11. Providing that eight hours' actual work shall constitute a lawful day's work in mines. Const., art. xix, § 1; Laws 1909, p. 21; Comp. Stats. 1910, §§ 3499–3504.

12. Creating office of state inspectors of coal mines, repealing §§ 110–115, Rev. Stats. 1899. Laws 1903, p. 18; Laws 1905, p. 102; Laws 1909, p. 30; Comp. Stats. 1910, §§ 3536–3548.

13. Providing for the proper ventilation of coal mines. Laws 1890–91, p. 340; Rev. Stats. 1899, §§ 2562–2585 (see Const., art. ix, § 2); Laws 1909, p. 104; Comp. Stats. 1910, §§ 3505–3535.

14. Prohibiting the employment of women and of boys under the age of fourteen years in coal, iron, or other dangerous mines. Const., art. ix, § 3; Laws 1890–91, ch. 20, § 5; Rev. Stats. 1899, § 2295; Comp. Stats. 1910, § 3107.

15. Providing for right of action by a person injured in a mine by reason of willful failure to comply with the provisions of law. Const., art. ix, § 4; Laws 1890–91, ch. 80, § 17; Rev. Stats. 1899, § 2582; Comp. Stats. 1910, § 3526.

16. Providing that the legislature may establish a school of mines. Const., art. ix, § 5.

17. Providing for the appointment of a state geologist, prescribing his term of office and duties. Const., art. ix, § 6; Rev. Stats. 1899, §§ 160–164; 1901, p. 42; 1907, p. 39; Comp. Stats. 1910, §§ 208–216.

18. Regulating the weighing of coal in mines. Laws 1890, ch. 79, §§ 1–4; Rev. Stats. 1899, §§ 2594–2596; Comp. Stats. 1910, §§ 3553–3555.

19. Authorizing mining companies to construct or operate a railroad, tramway-road, or wagon-road from mine to any point desired,

and granting right of way over unoccupied public domain for that purpose. Rev. Stats. 1887, § 525; Rev. Stats. 1899, § 3059; Comp. Stats. 1910, § 4002.

20. Exempting tools, etc., of miner from execution. Rev. Stats. 1887, § 2790; Rev. Stats. 1899, § 3910; Comp. Stats. 1910, § 4764.

21. Providing a method for the sale of mines or mining interests belonging to estates of decedents. Laws 1890–91, P. P., ch. 15, §§ 9–15; Rev. Stats. 1899, §§ 4776–4780; Comp. Stats. 1910, §§ 5645–5649.

22. Regulating charges for assays or tests in the University. Laws 1907, p. 128; Comp. Stats. 1910, § 3482.

23. Providing for the appointment of special deputy coal-mine inspectors, and providing for their compensation. Laws 1901, p. 103; Comp. Stats. 1910, §§ 3547, 3548.

24. Providing that the state geologist shall be *ex-officio* inspector of all mines other than coal mines, enumerating his duties and prescribing the extent of his authority. Laws 1903, p. 31; Comp. Stats. 1910, §§ 3483–3492.

25. Establishing a uniform code of mine signals and rules for visitors in mines. Laws 1903, p. 31; Comp. Stats. 1910, § 3489.

26. Providing for two state inspectors of coal mines, and prescribing their duties. Re-enacting Laws 1903, p. 18; Laws 1909, p. 167; Comp. Stats. 1910, §§ 3536–3546.

27. Providing that dry and dusty places in coal mines shall be sprinkled semi-weekly. Laws 1909, p. 153; Comp. Stats. 1910, §§ 3534, 3535.

28. Providing that all unused crosscuts in coal mines shall be walled up securely, and certain safety appliances used. Laws 1903, p. 8; Comp. Stats. 1910, § 3530.

29. Enacting rules for the sale, storage, and handling of explosives in mines. Laws 1903, p. 76; Comp. Stats. 1910, §§ 2964–2972.

30. Providing a method of taxing mines. Laws 1903, p. 101.

31. Authorizing state board of land commissioners to prescribe regulations for the leasing and development of state mineral lands. Laws 1903, p. 115; Amended 1907, p. 132; Comp. Stats. 1910, §§ 619–626.

32. Requiring annual reports from coal mine inspectors. Laws 1909, p. 94; Comp. Stats. 1910, §§ 3544–3546.

33. Establishing a bureau of mining statistics. Laws 1905, p. 143; Comp. Stats. 1910, §§ 3493–3498.

34. Relating to examination of coal mines by the inspectors. Laws 1909, p. 104; Comp. Stats. 1910, § 3539.

35. Relating to the protection of health of underground miners. Laws 1909, p. 21.

36. Prohibiting the pollution of streams containing fish by depositing refuse from mills, smelters, or reduction works. Rev. Stats. 1899, § 2148; Amended 1905, p. 25; 1907, p. 44; Comp. Stats. 1910, § 2815.

37. Prohibiting intoxicated persons from entering mines or metallurgical works or carrying liquor into the same. Laws 1905, p. 100; Comp. Stats. 1910, § 5890.

38. Concerning the sinking, safety, maintenance, use and operation of natural gas and oil wells. Laws 1905, p. 127; Comp. Stats. 1910, §§ 3556–3561.

39. Governing exercise of the right of eminent domain to condemn right of way for mining and milling purposes. Laws 1907, p. 58; Comp. Stats. 1910, § 3874.

40. Providing for the formation of corporations for mining purposes. Laws 1907, p. 82.

41. Providing for survey of underground works in coal and other mines. Laws 1911, p. 14.

42. Providing a lien for every laborer or miner for work and labor performed in developing and working in coal mines in the state of Wyoming. Laws 1911, p. 41.

43. Relating to weighing coal at mines. Laws 1911, p. 98, Amended, Laws 1913, p. 11.

44. Creating board of examiners of applicants for office of state mine inspector. Laws 1911, p. 164.

45. Prescribing qualifications for fire-boss and mine-boss in coal mines. Laws 1913, p. 16.

46. Providing for examining board for underground bosses. Laws 1913, p. 78.

47. Providing for installation of telephones in coal mines. Laws 1913, p. 64.

48. Prohibiting tampering with check numbers on mine cars. Laws 1913, p. 98.

# TITLE XIV.

## FORMS AND PRECEDENTS.

## NOTICES AND CERTIFICATES OF LOCATION.

The notice or certificate of a mining location is the basis of the miner's title—a statutory writing affecting realty, the first muniment of his paper title, upon the record of which patent proceedings are based (*ante*, §§ 379 and 459). The suggested forms here given have been prepared with a view to exhibiting the difference in the statutory requirements in the different states and territories, and to invite attention to the controlling importance of properly describing the claim with reference to *natural objects and permanent monuments*, and to the proper marking of the location on the ground. These forms are all necessarily based upon fictitious descriptions, and are offered merely as suggestions. The form for an amended certificate of location is given only under the Colorado forms. But the provisions of the statutes of the several states on the subject of amended certificates or notices of location are substantially identical, and therefore the form suggested for Colorado may be used in any of the states, with such modifications as are necessary to comply with the local statute for original certificates of location.

### ALASKA.

**Preliminary Notice for Posting on Lode Location.**

NOTICE IS HEREBY GIVEN that I, John Doe, have this day discovered a lode or ledge of rock in place carrying gold and other valuable minerals, and have this day posted this notice of location at the point of discovery. The general course of this vein is northeast and southwest. I claim in length seven hundred and fifty feet northeasterly, and seven hundred and fifty feet southwesterly from this discovery post, and three hundred feet of surface ground in width on each side of the center of the vein. This claim shall be known as the "Ster-

ling'' lode, situated in Harris mining district, Juneau precinct, territory of Alaska.

Discovery made and location posted October 1, 1913.

JOHN DOE, Locator.

NOTE.—See section 6 of Alaska Mining Act of 1913, Appendix, *ante*.

### Certificate of Location Work—Lode Location.

Territory of Alaska,
Juneau Precinct,—ss.

THIS IS TO CERTIFY that on the 1st day of October, 1913, I discovered and located the Sterling lode, situated in the Harris mining district, Juneau precinct, territory of Alaska; that on said day I posted at the point of discovery thereon a notice of location, as required by law, and duly recorded said notice.

That thereafter, and before the expiration of one year from the date of posting of such notice upon the claim, and discovery thereof as aforesaid, to wit, on the fifteenth day of November, 1913, I completed the sinking of a discovery shaft upon said lode; which shaft is eight feet square and ten feet deep vertically below the lowest part of its rim at the surface and at said depth of ten feet discloses a lode of rock in place carrying gold; said shaft is located at the point of discovery, which is on the lode line in the center of the claim and seven hundred and fifty feet southwest of the northerly end center post, and which discovery point is marked by a post four feet high, four inches square, and marked ''Discovery Post No. 1, Sterling Lode,'' and upon which the notice of location was posted. The value of said location or development work hereinabove described is more than one hundred dollars.

JOHN DOE.

Subscribed and sworn to before me this seventeenth day of November, 1913.

(Commissioner's Seal.) RICHARD ROE,
United States Commissioner and Recorder for Juneau precinct.

NOTE.—See sections 8 and 9 of the Alaska Mining Act of 1913, Appendix, *ante*.

### Certificate of Lode Location—For Recording.

NOTICE IS HEREBY GIVEN that on the first day of October, 1913, I, John Doe, a citizen of the United States, have discovered a lode of rock in place bearing gold and other valuable minerals, and posted thereon on said date a notice of location as required by law, which said lode location is bounded and described as follows, to wit:

Commencing at the initial monument, which is a four by four inch post four feet above the surface of the ground and situated about fifteen hundred feet easterly from the Alaska Juneau wharf on Gastineau Channel, which post is marked "Discovery Post No. 1, Sterling Lode"; thence running northeasterly seven hundred and fifty feet to a post marked on the side facing the claim: "N. end center post No. 2 Sterling Lode"; thence running northwesterly 300 feet to a post marked "N. W. cor. No. 3, Sterling Lode"; thence running southwesterly fifteen hundred feet to a post marked "S. W. cor. No. 4, Sterling Lode"; thence running southeasterly six hundred feet to a post marked "S. E. cor. No. 5, Sterling Lode"; thence running fifteen hundred feet northeasterly to a post marked "N. E. Cor. No. 6, Sterling Lode"; thence running three hundred feet northwesterly to said post at north end center. All of said posts are four by four inches and four feet long set one foot in the ground. I claim seven hundred and fifty feet along the course of this vein in a northeasterly direction and seven hundred and fifty feet in a southwesterly direction from the discovery post, together with three hundred feet of surface ground in width on each side of the center of the vein. All boundary lines have been monumented, brushed out and trees blazed, so that the lines can be readily traced.

The name of said claim is the "Sterling" lode, and is situated on the ridge of Mount Roberts about fifteen hundred feet east of the Alaska-Juneau wharf, in the Harris mining district, Juneau precinct, district of Alaska.

JOHN DOE, Locator.

NOTE.—See section 10 of the Alaska Mining Act of 1913, Appendix, *ante*. A certificate of location must be recorded within ninety days after discovery.

### Preliminary Notice for Posting on Placer Claim.

NOTICE IS HEREBY GIVEN that I, John Doe, a citizen of the United States, have this first day of October, 1913, discovered a valuable deposit of placer gold within the limits of this claim and have this day posted this notice of location at the point of discovery. I claim twenty acres of ground, thirteen hundred and twenty feet in length in an easterly and westerly direction, by six hundred and sixty feet in width as staked on the ground.

This claim shall be known as the "Bedrock" placer mining claim and is situated on Willow creek, in the Harris mining district, Juneau precinct, territory of Alaska.

Discovered and notice posted this first day of October, 1913.

JOHN DOE, Locator.

NOTE.—See section 14 of the Alaska Mining Act of 1913, Appendix, *ante*.

### Certificate of Placer Location—For Recording.

NOTICE IS HEREBY GIVEN that I, John Doe, a citizen of the United States, have heretofore on the first day of October, 1913, discovered placer gold on the following described tract of land and on said date posted thereon a notice of location as required by law, and I claim twenty acres of placer mining ground, described as follows, to wit:—

Beginning at a post marked "Discovery Post S. W. Cor. No. 1, Bedrock Placer," which is at the discovery shaft; running thence north six hundred and sixty feet to post marked "N. W. Cor. No. 2, Bedrock Placer"; thence east thirteen hundred and twenty feet to post marked "N. E. Cor. No. 3, Bedrock Placer"; thence south six hundred and sixty feet to post marked "S. E. Cor. No. 4, Bedrock Placer"; thence west thirteen hundred and twenty feet to place of beginning.

All of said posts are four by four inch and four feet long set one foot in the ground and all the boundary lines have been brushed out and the trees blazed and monuments erected so that said lines can be readily traced.

The claim is situated on the right bank of Willow creek about eight hundred feet northeast of the junction of Willow

creek with Fox creek, and is the original discovery on said creek in the Harris mining district, Juneau precinct, Alaska, and the name of said claim is the "Bedrock" placer.

The location work has been performed about ten feet northeast of the discovery post or southwest corner of the claim, and consists of a shaft, twenty feet deep, six by four feet, and said work is worth at least one hundred dollars. Said work was performed between October 1 and November 15, 1913.

JOHN DOE, Locator.

Subscribed and sworn to before me this 17th day of November, 1913.

(Commissioner's Seal.) RICHARD ROE,
United States Commissioner and Recorder for Juneau precinct, Alaska.

NOTE.—Within ninety days from date of discovery and prior to filing the above certificate of location, one hundred dollars' worth of location work must be performed on the location. The certificate of location must be recorded within ninety days after the discovery. See sections 16 and 17 of the Alaska Mining Act of 1913, Appendix, *ante*.

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## ARIZONA.

### Notice of Lode Location.

[Act of March 16, 1901.]

NOTICE IS HEREBY GIVEN, that I, Peter Smith, a citizen of the United States, have discovered at a point immediately contiguous to the place where this notice is posted, a vein of rock in place carrying gold, silver, and other valuable deposits.

In accordance with the provisions of title thirty-two, chapter six, of the Revised Statutes of the United States and the laws of the state of Arizona, I hereby claim fifteen hundred linear feet of said vein measured thereon as hereinafter set forth, and hereby locate the same as a lode mining claim. That immediately contiguous to said point of discovery I have erected a conspicuous monument of stones more than three feet in height, in which monument of stones I have posted this location notice:

This claim shall be and the same is hereby named the "Josephine."

The general course of said claim and the vein therein is east and west.

Said claim is fifteen hundred feet in length, measured seven hundred and fifty feet east and seven hundred and fifty feet west from the said point of discovery to each end of the claim, and is three hundred feet in width on each side of the middle of the vein. It is situated upon public unsurveyed lands in Ellsworth mining district, Yuma county, state of Arizona. It is bounded on the north by the Golden Eagle mine (patented), belonging to the Harqua Hala Gold Mining Company. The said point of discovery and monument of stones is distant three hundred feet southerly from the point where the Harqua Hala and the Harrisburg trail crosses the south boundary of said Golden Eagle mine.

Said claim is more particularly described with reference to its boundaries, as I have marked the same upon the ground, as follows:—

Beginning at a monument of stones marked "J. N. E. Cor.," at the northwest corner of said claim, being also the southeast corner of the said Golden Eagle mine; thence running west along the southern boundary of said Golden Eagle mine fifteen hundred feet to a monument of stones at the northwest corner of said claim, marked "J. N. W. Cor."; thence at right angles south three hundred feet to a monument of stones at the center of the west end-line of said claim, marked "J. W. L. Mon."; thence continuing south three hundred feet to a monument of stones at the southwest corner of said claim, marked "J. S. W. Cor."; thence at right angles east fifteen hundred feet to a monument of stones at the southeast corner of said claim, marked "J. S. E. Cor."; thence at right angles north three hundred feet to a monument of stones at the center of the east end-line of said claim, marked "J. E. L. Mon."; thence continuing north three hundred feet to the place of beginning.

All of the said monuments are substantial stone monuments at least three feet high.

In accordance with section thirty-two hundred and thirty-four of the Revised Statutes of Arizona, 1901 (Civil Code), I claim ninety days from the date of this location in which to do or cause to be done the acts therein specified.

This location is made and notice posted on the ground this first day of December, 1913.

(Signed) PETER SMITH, Locator.

A copy of this notice is required to be recorded in the office of the county recorder of the county in which the claim is situated within ninety days from the date of posting on the claim.

Instead of stone monuments, substantial posts, securely fixed, and projecting at least four feet above the surface of the ground may be used for marking the boundaries and for the discovery monument.

### Notice of Placer Location.

NOTICE IS HEREBY GIVEN, that I, Peter Smith, a citizen of the United States, have discovered a valuable placer deposit within the limits of the claim hereinafter mentioned and hereby located.

In accordance with the provisions of title thirty-two, chapter six, of the Revised Statutes of the United States, and title forty-seven of the Revised Statutes of Arizona, 1901 (Civil Code), I hereby claim a tract of land containing twenty acres situated upon public unsurveyed land in Ellsworth mining district, Yuma county, state of Arizona, and bounded on the north by the Wonder placer mining claim, belonging to the Wonder Gold Mining Company, and on the west by the east bank of Sand creek.

The said claim shall be and the same is hereby named the "Sand Creek Placer Mining Claim."

The following is a description of said claim as I have marked the boundaries thereof upon the ground:—

Commencing at a post marked "S. C. P. N. W. Cor." at the northwest corner of said claim, being the point at which the south boundary line of said Wonder placer mining claim intersects the east bank of Sand creek, from which point a yellow pine tree four feet in diameter, blazed and marked "B. T.

S. C. P. N. W. Cor." bears south ten feet distant; thence southerly along the said bank of Sand creek thirteen hundred and twenty feet to a post at the southwest corner of said claim, marked "S. C. P. S. W. Cor."; thence easterly six hundred and sixty feet to a post at the southeast corner of said claim, marked "S. C. P. S. E. Cor."; thence at right angles northerly thirteen hundred and twenty feet to a post at the northeast corner of said claim, marked "S. C. P. N. E. Cor."; thence at right angles westerly six hundred and sixty feet to the point of commencement. All of said posts are at least four inches square by four feet six inches in length and set at least one foot in the ground and surrounded by a mound of stones.

This notice of location is posted on a monument of stones at a point one hundred feet southeast from the post which marks the northwest boundary of said claim.

This location is made this first day of December, 1913.

(Signed) PETER SMITH.

NOTE.—A copy of this notice is required to be recorded in the office of the recorder of the county in which the claim is situated within sixty days after the date of location.

## ARKANSAS.

In this state there are no requirements concerning the contents of notices or certificates of location. Any of the forms prescribed for other states may be used.

## CALIFORNIA.

### Notice of Lode Location.

[Act of 1909, § 1426, Civil Code.]

NOTICE IS HEREBY GIVEN that I, John Doe, a citizen of the United States having discovered a vein or lode of mineral-bearing quartz or rock in place carrying gold, do hereby claim under and by virtue of the mining laws of congress and of the state of California, fifteen hundred linear feet of said vein or lode, together with surface ground extending three hundred

feet in width on each side of said vein or lode, and I do hereby locate said ground, which is more particularly described as follows:—

Commencing at a stake set in a mound of stone where this notice is posted, which stake is at the point of discovery on said vein or lode and on the center line of this claim, I hereby claim six hundred feet extending in a southwesterly direction along the course of said vein from said point of discovery to stake at center of the southerly end line of this claim, and nine hundred feet in a northeasterly direction also extending from said point of discovery to a stake at center of the northerly end-line of this claim. The general course of the vein or lode is northeasterly and southwesterly as nearly as can be determined from present developments. The northerly end center stake is situated about seven hundred feet due west of the old quartz-mill on what is known as the Pioneer quartz location and thence the claim extends three hundred feet northwesterly to the northwest corner, identical with the northeast corner of the Reserve Mine (patented), thence southwesterly fifteen hundred feet to the southwest corner, thence southeasterly six hundred feet to the southeast corner near the junction of Coffee and Dry creeks, thence northeasterly fifteen hundred feet to the northeast corner, thence three hundred feet northwesterly to the northerly end center stake, the place of beginning. All of the corners are marked by four by four inch stakes four feet high set in mounds of stone.

This claim is situated in what is commonly known as Gold Mountain mining district, Sierra county, California.

The name of this claim is the "Sterling" lode.

Discovered and located this twenty-eighth day of November, 1913.

JOHN DOE, Locator.

NOTE.—Section 1426b, Civil Code, requires a copy of the notice posted on the claim to be recorded in the county records within thirty days thereafter.

## Notice of Placer Location.

[Act of 1909, § 1426c, Civil Code.]

NOTICE IS HEREBY GIVEN that I, Richard Roe, a citizen of the United States, having discovered in the following described tract of land, a valuable deposit of gold-bearing gravel, do hereby, by virtue of the mining laws of congress and of the state of California, locate said ground as a placer claim, the same being situated in section 4 of township twenty-four north, range seven east, Mt. Diablo meridian, Spanish Creek mining district, Plumas county, California, and more particularly described as follows:—

Commencing at the quarter section corner between sections 3 and 4, township 24 north, range 7 east, Mt. Diablo Meridian, thence north along section line six hundred and sixty feet, thence east thirteen hundred and twenty feet, thence south six hundred and sixty feet, thence west thirteen hundred and twenty feet, to the place of beginning, and containing twenty acres more or less, being the south half of the southwest quarter of the northwest quarter of said section 4. The corners of this claim are marked by stakes in mounds of stone and this notice of location is posted near the southwest corner of the claim at the shaft which has been sunk to bedrock.

The name of this claim is the "Bedrock" placer.

Discovered and located this twenty-eighth day of November, 1913.

RICHARD ROE, Locator.

NOTE.—Section 1426c of the Civil Code provides that when a placer claim is taken by legal subdivisions, no other description is necessary and the boundaries need not be staked. As to the necessity of staking placer claims, see sections 454, 455 of the text. Section 1426d provides that a copy of the posted notice must be recorded within thirty days thereafter.

## COLORADO.

### Preliminary Lode Notice for Posting.

NOTICE IS HEREBY GIVEN, that I, John Jones, a citizen of the United States, have discovered a lode of rock in place carrying gold, silver, and other valuable deposits, upon which I have erected a discovery monument and posted this notice.

In accordance with the provisions of title thirty-two, chapter six, of the Revised Statutes of the United States, and the laws of the state of Colorado, I hereby claim fifteen hundred linear feet of said vein, measured thereon as hereinafter set forth.

The general course of this vein is north and south. I claim in length thereon eight hundred feet northerly and seven hundred feet southerly from said discovery monument. I also claim one hundred and fifty feet on each side of the center of said vein.

NOTE.—In Gilpin, Clear Creek, Boulder and Summit counties, width is limited to seventy-five feet on each side of the center of the vein. In other counties, one hundred and fifty feet on each side of such center.

Said lode is situated in Cripple Creek mining district, El Paso county, Colorado. It shall be known as the Mountain Maid lode. Said discovery was made January 1, 1912.

In accordance with the laws of the state of Colorado, I claim sixty days from date of such discovery, to enable me to sink a discovery shaft thereon, and three months from such discovery to otherwise perfect and record the location of said claim.

Dated and posted on the ground, January 1, 1912.

JOHN JONES, Locator.

NOTE.—This is not to be recorded. See text, § 351.

### Certificate of Lode Location for Recording.

I, John Jones, a citizen of the United States, hereby certify: That on January 1, 1912, I discovered within the limits of the claim hereinafter described, a lode of rock in place,

bearing gold, silver, and other valuable deposits; that thereafter, and prior to recording this certificate, I located said claim in the following manner: On January 1, 1912, I posted at the point of discovery a plain notice, containing the name of the lode (the "Mountain Maid"), the name of the locator (John Jones), and date of discovery (January 1, 1912). On January 30, 1912, I completed sinking a shaft on said lode at the point of discovery, to a depth of twelve feet, showing therein a well-defined crevice. On February 1, 1912, I marked the location upon the ground so that its boundaries can be readily traced.

The general course of said lode is north and south. I claim in length on said lode eight hundred feet northerly and seven hundred feet southerly from the center of the discovery shaft, and in width one hundred and fifty feet on each side of the center of said vein.

Said claim is known as the Mountain Maid lode claim, is situated on the southern slope of Tenderfoot hill in Cripple Creek mining district, El Paso county, Colorado, and as marked on the ground is bounded and described as follows:—

Commencing at the discovery monument, which is situated six hundred feet easterly from a large fir tree standing on the north bank of Poverty gulch; thence north eight hundred feet to a post, marked "M. M. 1 N. L. P.," as and for the north lode post, from which stake a pine tree, eight inches in diameter, blazed and marked "M. M. 1 B. T.," bears north sixty feet distant; thence at right angles west one hundred and fifty feet to a post in mound of rocks, the northwest corner of the claim, post marked "M. M. N. W. cor."; thence at right angles south seven hundred and fifty feet to post in mound of rocks, as and for the center west side-line post, post marked "M. M. W. S. L."; thence continuing on said course south seven hundred and fifty feet to a stake and mound of rocks, the southwest corner of the claim, stake marked "M. M. S. W. Cor."; thence at right angles east one hundred and fifty feet to a post marked "M. M. S. L. P.," as and for south lode post; thence continuing east one hundred and fifty feet to a post in mound of rocks, the southeast corner of the claim,

post marked "M. M. S. E. Cor."; thence north seven hundred and fifty feet to post in mound of rocks, as and for the center east side-line post, post marked "M. M. E. S. L."; thence continuing north seven hundred and fifty feet to a post in mound of rocks, the northeast corner of the claim, post marked "M. M. N. E. Cor."; thence at right angles west one hundred and fifty feet to the north lode post, marked "M. M. N. L. P." All of said posts are marked upon the sides which are in toward the claim, and are sunk in the ground one foot, and project above ground four feet. The rock mounds are four feet in diameter and two feet in height.

Dated February 3, 1912. JOHN JONES, Locator.

NOTE.—This must be recorded within three months from date of discovery. The Colorado law does not require center end-line posts. They are used in the description for the purpose of "tying" the claim to the discovery monument. Some of the states and territories require them.

### Preliminary Placer Notice for Posting.

NOTICE IS HEREBY GIVEN, that I, William White, a citizen of the United States, have discovered a valuable placer deposit, upon which I have posted this notice. I hereby locate and claim twenty acres of the same as a placer mining claim. The name of said claim is the Annabel placer mine. It is situated in —— mining district, —— county, Colorado. Said discovery was made on the fifth day of February, 1912. I have marked the surface boundaries of said claim by substantial posts, and sunk in the ground, to wit, one at each angle of the claim.

In accordance with section forty-two hundred and five, Revised Statutes of Colorado, I claim thirty days from the said date of discovery within which to record a location certificate of said claim.

Dated and posted on the ground this fifth day of February, 1912.

(Signed) WILLIAM WHITE, Locator.

NOTE.—This notice is not to be recorded. See text, § 351.

### Certificate of Placer Location.

I, William White, a citizen of the United States, hereby certify: That on February 5, 1912, I discovered within the limits of the claim hereinafter described, a valuable placer deposit. That thereafter, to wit, on February 5, 1912, before filing this certificate for record, I located said claim as a placer mining claim in the following manner: First, I posted on said claim a plain notice containing the name of the claim, the name of the locator, the date of discovery, and the number of acres claimed. Second, I marked the surface boundaries of said claim with substantial posts, and sunk in the ground, to wit, one at each angle of the claim.

The name of said claim is the Annabel placer mine. It contains twenty acres of land, and is situated in the —— mining district, county of ——, state of Colorado, and as marked on the ground is bounded and described as follows: [Here insert description. The suggestions contained in the description in the form of placer location for Arizona may be followed.]

Dated March 4, 1912.

WILLIAM WHITE, Locator.

### Amended Certificate of Lode Location.

I, John Jones, a citizen of the United States, hereby certify:

That I am the owner and original locator of that certain lode mining claim situated in the Cripple Creek mining district, El Paso county, Colorado, and named the Mountain Maid lode.

That on the first day of January, 1912, I discovered within the limits of said claim, and the claim as hereinafter described, a lode of rock in place, bearing gold, silver, and other valuable deposits, and thereupon, beginning on the said first day of January, 1912, I located said claim as required by section forty-one hundred and ninety-seven, Revised Statutes of Colorado, and within three months thereafter made

and caused to be recorded in the office of the recorder of said El Paso county, a certificate of location thereof, purporting to comply with the then existing laws of the United States, and the state of Colorado.

That for the purpose of changing the surface boundaries of said claim and avoiding conflicts with other locations, and for the further purpose of curing any defects and errors in said original certificate and any failure to comply with the requirements of the law before filing the same, I now make and file for record in the office of the said recorder, this my amended certificate of location of said claim.

That the general course of said lode is northeast and southwest. I claim thereon in length one thousand four hundred feet northeasterly and one hundred feet southeasterly from the center of the discovery shaft.

That before making and filing for record this amended certificate of location, I located said claim by first sinking a discovery shaft upon the lode a depth of twelve feet from the lowest part of the rim of such shaft at the surface, showing a well-defined crevice; second, by posting at the point of discovery a plain notice containing the name of the lode, the name of the locator, and the date of discovery; third, by marking the surface boundaries of the claim, so that the same can be readily traced.

That said claim is known as the "Mountain Maid," and as amended is described as follows: [Here insert description.]

That said amended location as above described, embraces the original discovery, as well as all development work which I have performed upon or for the benefit of said original claim, and I therefore claim that this amended certificate of location relates back to the date of the original location, and that it is entitled to the benefit of the original discovery, as well as of all work done or improvements made by me within the limits of the said amended location or for the benefit of the original location.

Dated July 9, 1912.

JOHN JONES, Locator.

### Amended Certificate of Placer Location.

The suggestions contained in the preceding form of amended certificate of lode location, with such modifications as are necessary to comply with the form suggested for original certificate of placer location, will meet the requirements of the law.

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## IDAHO.

### Discovery Notice for Posting on Lode Claim.

NOTICE IS HEREBY GIVEN, that I, Henry Harris, a citizen of the United States, have, this fifth day of July, 1912, discovered a lode bearing gold, silver, and other valuable deposits, and have erected at the place of discovery a monument of stones, four feet high above the ground, upon which this notice is posted. The name of the claim is the Bell lode. I claim six hundred feet of the vein north from the discovery monument, and nine hundred feet south from said monument.

In accordance with the laws of the state of Idaho, I claim ten days from the said date of discovery in which to mark the boundaries of said claim and post a notice of location thereon.

Dated July 5, 1912. HENRY HARRIS.

### Notice of Lode Location.

[To be posted and recorded.]

NOTICE IS HEREBY GIVEN, that I, Henry Harris, a citizen of the United States, on July 5, 1912, discovered within the limits of the claim hereinafter described, a lode of rock in place, bearing gold, silver, and other valuable deposits. On said day, at the time of making said discovery, I erected a monument of stones, four feet in height above the ground, at the place of discovery, on which this notice is posted, upon which I placed a notice containing the name of the locator (Henry Harris), the name of the claim (the "Bell lode"), the date of discovery (July 5, 1912), and the distance claimed along the vein each way from such monument (six hundred feet north and nine hundred feet south) Within ten days

from the date of said discovery, to wit: on July 12, 1912, I marked the boundaries of said claim by establishing at each corner thereof and at any and all angles in the side-lines thereof, a post marked with the name of the claim and the corner or angle it represents. Also, at the time of so marking said boundaries I posted on the said discovery monument this notice of location.

From said discovery monument the point at which Washington gulch intersects Murphy's gulch bears northeast nine hundred feet distant.

I claim in length along the said ledge six hundred feet northerly and nine hundred feet southerly from the point of discovery, and in width three hundred feet on each side of the middle of the ledge.

Said claim is named the Bell lode claim, is situated on the northern side of the Bell mountain, in —— mining district, county of ——, state of Idaho, and as marked on the ground is bounded and described as follows:—

Commencing at a post at the northeast corner of said claim, marked "Bell lode, northeast corner," from which the point of conjunction between Washington gulch and Murphy's gulch bears north ten degrees east, one hundred and twenty feet distant; running thence south fifteen hundred feet to a post at the southeast corner of said claim, marked "Bell lode, southeast corner"; thence at a right angle west six hundred feet to a post at the southwest corner of said claim, marked, "Bell lode, southwest corner"; thence at a right angle north fifteen hundred feet to a post at the northwest corner of said claim, marked "Bell lode, northwest corner"; thence at a right angle east six hundred feet to the point of commencement.

All of said posts are substantially set in the ground and are at least four feet high above the ground and at least four inches in diameter, and are hewn and marked on the side facing toward the discovery.

In accordance with the laws of the state of Idaho, I claim sixty days from and after the date of this location within which to sink a discovery shaft on said claim, and ninety days

after said date within which to record a substantial copy of this notice of location.

Dated July 12, 1912.

HENRY HARRIS, Locator.

State of Idaho,
County of Clark,—ss.

I, Henry Harris, do solemnly swear, that I am a citizen of the United States, and that I am acquainted with the mining ground described in this notice of location and herewith called the Bell lode; that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this state, and that I have opened new ground to the depth of ten feet, as required by the laws of Idaho.

HENRY HARRIS, Locator.

Subscribed and sworn to before me this twelfth day of July, A. D. 1912.

(Seal.) WILLIAM JOHNSON.
Notary Public.

NOTE.—If the claim is a relocation, the affidavit should state the fact, and that the prior location "has been forfeited by reason of the failure of the former locators to comply in respect thereto with the requirements of said laws."

### Notice of Placer Location.

NOTICE IS HEREBY GIVEN, that I, Richard Brown, a citizen of the United States, have discovered within the limits of the claim hereinafter described a valuable placer deposit. I have located said claim for the purpose of mining said placer deposit. At the time of making the said location, I placed at each corner of said claim a substantial post marked with the name of the claim and the corner it represents. I also posted this notice of location on one of said posts, to wit: the post placed at the northwest corner of said claim, from which post a yellow pine tree four feet in diameter, blazed and marked "Bearing tree, Tom Cat Placer," bears north twenty feet distant. Said location was made on the first day of April, 1912. Said claim is named the "Tom Cat Placer," and is

one thousand three hundred and twenty feet in length by six hundred and sixty feet in width, more or less, and contains twenty acres. It is situated on public unsurveyed lands in the —— mining district, county of ——, state of Idaho, and, as marked on the ground, is bounded and described as follows: [Here insert description. The suggestions contained in the description in the form of notice of placer location for Arizona may be followed, except that the full name of the claim instead of the initials should be marked on the posts.]

In accordance with the provisions of section thirty-two hundred and twenty-two of the Revised Codes of Idaho, I claim fifteen days from the said date of location, within which to make an excavation of one hundred cubic feet on this claim, and thirty days after said date within which to record a substantial copy of this notice of location.

Dated April 1, 1912.

RICHARD BROWN, Locator.

Attach affidavit similar to that annexed to the form of notice of lode location.

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## MONTANA.

### Preliminary Notice for Posting on Lode Claim.

NOTICE IS HEREBY GIVEN, that I, John Peckham, a citizen of the United States, have, this tenth day of June, 1912, discovered a lode bearing gold, silver, and other valuable deposits, and have named the same the Dobson lode. The general course of the lode is east and west, and I claim four hundred lineal feet on the vein east of the point where the discovery was made at which point this notice is posted, and eleven hundred lineal feet west from the said place of discovery; and I claim three hundred lineal feet on each side of the center of the vein.

Dated and posted on the ground June 10, 1912.

JOHN PECKHAM, Locator.

### Preliminary Notice for Posting on Placer Claim.

NOTICE IS HEREBY GIVEN, that I, John Peckham, a citizen of the United States, have, this tenth day of June, 1912, discovered a valuable placer deposit upon which, at the point of discovery, this notice is posted, and hereby claim the same as a placer mining claim. The name of said claim is the Dobson placer. It consists of a tract of land containing twenty acres.

Dated and posted on the ground June 10, 1912.

JOHN PECKHAM, Locator.

### Declaratory Statement.

I, John Peckham, a citizen of the United States, hereby declare:—

That on the tenth day of June, 1912, I discovered and located the lode herein mentioned, bearing gold, silver, and other valuable deposits, and on the said day posted a notice of location in compliance with section twenty-two hundred and eighty-three of the Revised Codes of Montana, at the place of said discovery, and named the lode the Dobson lode;

That within thirty days after posting said notice of location, to wit: on the twenty-fifth day of June, 1912, I defined the boundaries of said claim by setting a post at each corner and angle of the claim as hereinafter indicated; and within sixty days from said date I sunk a discovery shaft upon said lode and claim;

That the said discovery shaft is located at the point of discovery from which Grizzly Rock on the west slope of Black Hill bears west one thousand feet distant, is twelve feet deep and eight feet square, and discloses a well-defined crevice;

That the general course of the said vein is east and west, and I claim four hundred lineal feet on the vein east and eleven hundred lineal feet west from the point of discovery,

and three hundred lineal feet on each side of the center of the vein.[1]

That the said claim is located in the Hamilton mining district, Deer Lodge county, Montana, and as marked on the ground is bounded and described as follows:—

[The description suggested for the Arizona notice of location will fulfill the requirements of the Montana law.]

All of said posts are at least four inches square by four feet six inches in length, and set one foot in the ground. The rock mounds are at least four feet in diameter and two feet in height.

Dated August 3, 1912.

JOHN PECKHAM, Locator.

State of Montana,
County of Deer Lodge,—ss.

John Peckham, being first duly sworn, deposes and says: I am the locator named in the foregoing declaratory statement. The facts stated in said declaratory statement are true.

JOHN PECKHAM.

Subscribed and sworn to before me this third day of August, 1912.

(Seal.) GEORGE HUDSON,
Notary Public, Deer Lodge county, Montana.

NOTE.—To be recorded in the office of the county clerk within sixty days from posting the notice of discovery.

[1] If a placer or millsite claim, substitute instead of this paragraph the following: That said claim consists of a tract of land containing twenty acres, as hereinafter described.

## NEVADA.

### Notice of Location for Posting on Lode Claims.

The form of preliminary notice for posting on lode claims given above for Montana may be used in Nevada.

### Lode Location Certificate.

I, William Harvey, a citizen of the United States, do hereby certify:—

That on the tenth day of June, 1912, I discovered a lode of rock in place bearing gold, silver, and other valuable deposits, and on said day located a claim thereon in the following manner:—

At the point of said discovery I posted a notice of location, which contained: First, the name of the lode; second, the name of the locator; third, the date of the location; fourth, the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein or lode, and the general course of the lode. I defined the boundaries of said claim by setting a post at each corner and at the center of each side-line of the claim. Each of said posts is at least four inches square by four feet six inches in length, set one foot in the ground, with a mound of stone four feet in diameter by two feet in height around it;

That thereafter, and before the expiration of ninety days from the posting of such notice upon the claim, to wit, upon the twelfth day of August, 1912, I completed the sinking of a discovery shaft upon said claim and lode:

That the said discovery shaft is twelve feet deep from the lowest part of its rim at the surface by eight feet square, and discloses a lode deposit of mineral in place. It is located at the point of discovery, from which point the confluence of Rock creek with Willow creek bears east eight hundred feet distant;

That the name of said claim is the Johnson lode;

That the general course of said lode is east and west, and I claim seven hundred and fifty lineal feet in length thereon

each way from the point of discovery, and a width of three hundred feet on each side of the center of the vein;

That said claim is situated in —— mining district, —— county, Nevada, and the following is a more particular description of said claim and of each corner thereof, as I have marked the same upon the ground:—

Beginning at a post in a mound of stones at the northeast corner of said claim, marked "J. N. E. Cor.," from which a yellow pine tree three feet in diameter standing on the west bank of Rock creek, blazed and marked "B. T. J. N. E. Cor.," bears east thirty-five feet distant; thence at a right angle west seven hundred and fifty feet to a post in a mound of stones, as and for the north side-line post, marked "J. N. S. P."; thence continuing west seven hundred and fifty feet to a post in a mound of stones at the northwest corner of said claim, marked "J. N. W. Cor.," from which a large granite boulder twelve feet high and twenty feet in diameter, marked "B. R. J. N. W. Cor.," bears northwest seventy feet distant; thence at a right angle south six hundred feet to a post in a mound of stones at the southwest corner of said claim, marked "J. S. W. Cor.," from which a tamarack tree two feet in diameter, blazed and marked "B. T. J. S. W. Cor.," bears south fifty feet distant; thence at a right angle east seven hundred and fifty feet to a post in a mound of stones, as and for the south side-line post, marked "J. S. S. P."; thence continuing east seven hundred and fifty feet to a post in a mound of stones at the southeast corner of said claim, marked "J. S. E. Cor.," from which post a yellow pine tree four feet in diameter, blazed and marked "B. T. J. S. E. Cor.," bears southwest ten feet distant; thence at a right angle north six hundred feet to the point of beginning.

Dated and posted on the ground this fifteenth day of August, 1912. WILLIAM HARVEY, Locator.

NOTE.—This certificate should be recorded with the mining district recorder and the county recorder of the mining district or county in which the claim is situated within ninety days of the date of posting the notice of location on the claim.

### Notice of Location for Posting on Placer Claims.

The form of preliminary notice for posting on placer claims given on a preceding page for Montana may be used.

### Placer Location Certificate.

I, William Harvey, do hereby certify:—

That I am a citizen of the United States;

That on the tenth day of June, 1912, I discovered a valuable placer deposit within the limits of the claim hereinafter described, and on said day located the same as a placer mining claim in the following manner:—

At the point of discovery I erected a monument of stones and posted thereon a notice of location which contained: First, the name of the claim (Harvey placer); the name of the locator (William Harvey); the date of the location (June 10, 1912), and the number of acres claimed (twenty acres).

On the same day I marked the boundaries of said claim by setting a post at each corner and at the center of each sideline of the claim. Each of said posts is at least four inches square by four feet six inches in length, set one foot in the ground, and surrounded by a mound of stones four feet in diameter by two feet in height.

That within ninety days after posting said notice of location on said claim, to wit, on the first day of August, 1912, I completed the performance of not less than twenty dollars' worth of labor upon the said claim for the development thereof. Said labor consisted in an excavation of four hundred cubic feet of earth, and was performed at the said point of discovery, from which the northwest corner of said claim bears northwest two hundred feet distant;

That the name of said claim is the Harvey placer.

That said claim consists of a tract of land containing twenty acres, situated on public unsurveyed land, in —— mining district, —— county, Nevada, and, as marked on the ground, is particularly described as follows: [Here insert

description, which may follow the suggestions given in the form of lode location certificate above.]

Dated this fifteenth day of August, 1912.

WILLIAM HARVEY, Locator.

The requirements for recording are the same as those given in a previous note for lode location certificates.

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## OREGON.

### Notice of Lode Location.

NOTICE IS HEREBY GIVEN, that I, Thomas Green, a citizen of the United States, have, this first day of September, 1912, discovered in the Virtue mining district, Baker county, Oregon, a lode of mineral-bearing rock in place containing gold, silver, and other valuable deposits, which lode I have named the Lookout lode.

The point of discovery on said lode is situated four hundred feet east of the lone pine tree on the west slope of Bald Hill, with reference to which tree the said lode has a general course in a northerly and southerly direction. I claim three hundred lineal feet along the lode south of the point of discovery, and twelve hundred lineal feet along the lode north of said point of discovery. I further claim three hundred feet in width on each side of the middle of said lode.

The said claim is more particularly described with reference to its boundaries, as I have marked them on the ground, as follows: Commencing at a post in a mound of rocks at the southwest corner of said claim, marked "L. S. W. Cor.," from which post said lone pine tree bears north thirty degrees west, —— feet distant; thence running north fifteen hundred feet to a post in a mound of rocks at the northwest corner of said claim, marked "L. N. W. Cor."; thence at right angles east six hundred feet to a post in a mound of rocks at the northeast corner of said claim, marked "L. N. E. Cor,"; thence at right angles south fifteen hundred feet to a post in a mound of rocks at the southeast corner of said

claim, marked "L. S. E. Cor."; thence at right angles west to the point of commencement.

Dated and posted on the ground September 1, 1912.

THOMAS GREEN, Locator.

Within sixty days after posting the above notice a copy of the same must be filed for record with the recorder of conveyances, if there be one, otherwise, with the county clerk, to which copy there must be attached an affidavit, substantially as follows:

State of Oregon,
County of Baker,—ss.

Thomas Green, being first duly sworn, deposes and says: I am the locator named in the foregoing notice of location. Before the expiration of sixty days from the date of posting the said notice of location upon the said Lookout lode claim, and before recording said notice of location, I sunk a discovery shaft at the point of discovery upon said claim, to a depth of ten feet from the lowest part of the rim of such shaft at the surface showing a lode of mineral deposit in place.

THOMAS GREEN.

Subscribed and sworn to before me this fifteenth day of October, 1912.

(Notarial Seal.) WILLIAM BLACK,
Notary Public in and for the county of Baker, state of Oregon.

### Notice of Placer Location.

No particular form is required. The forms given for any of the other states may be used.

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## NEW MEXICO.

### Notice of Location for Lode Claim.

NOTICE IS HEREBY GIVEN, that I, Mark Porter, have declared my intention to become a citizen of the United States; that I have, this first day of December, 1913, distinctly marked the boundaries of a mining claim upon a lode bearing gold, silver,

and other valuable deposits, discovered by me on said day, which claim I have named the Amy lode; that it is my intention to locate the same according to the laws of the state of New Mexico.

The said claim is located in the Steeple Rock mining district, in Grant county, state of New Mexico, and is bounded and described as follows:—

Beginning at a post eight hundred feet east and one hundred and nine feet south of the point where the Santa Rosa trail crosses the south bank of Vegas creek, the said post being marked "A. L. S. W. Cor."; thence easterly seven hundred and fifty feet to the south center side-line post, marked "A. L. S. S. L."; thence continuing in the same direction seven hundred and fifty feet to a post at the southeast corner, marked "A. L. S. E. Cor."; thence at right angles northerly three hundred feet to a post at the center of the east end-line, marked "A. L. E. L. P."; thence continuing in the same direction three hundred feet to a post at the northeast corner of the claim, said post being marked "A. L. N. E. Cor.," from which post a pine tree, two feet in diameter, marked "B. T. A. L. N. E. Cor.," bears north ten feet; thence at right angles westerly seven hundred and fifty feet, to the north center side-line post, marked "A. L. N. S. L."; thence continuing westerly seven hundred and fifty feet to a post at the northwest corner of the claim, marked "A. L. N. W. Cor."; thence at right angles southerly three hundred feet to a post at the center of the west end-line, marked "A. L. W. L. P."; thence continuing in the same direction three hundred feet to the point of commencement.

MARK PORTER, Locator.

NOTE.—A copy of the posted notice must be recorded in the office of the county recorder within three months after the date of posting.

The location of mineral lands belonging to the state and provisions for the leasing of the same are provided in chapter 32, approved June 14, 1912, of the Laws of New Mexico.

## NORTH DAKOTA.

### Preliminary Notice for Posting.

TAKE NOTICE, that I, Joseph Bates, a citizen of the United States, discovered, on the third day of March, 1912, a mineral lode, bearing gold, silver, and other valuable deposits, which lode I have named the Mascot lode.

That I claim eight hundred feet on the said lode east of the point of discovery, the place where this notice is posted, and seven hundred feet west of the said point of discovery.

That I claim one hundred and fifty feet on each side of the middle of said lode.

That the said lode is located in the Hard Rock mining district, Bryant county, North Dakota.

Date of posting, March 27, 1912.

JOSEPH BATES.

### Certificate of Lode Location.

I HEREBY CERTIFY, that on March 3, 1912, I Joseph Bates, a citizen of the United States, discovered in Hard Rock mining district, Bryant county, North Dakota, a mineral lode, bearing gold, silver, and other valuable deposits, which lode I named the Mascot lode.

That thereafter I located a claim thereon by sinking a discovery shaft ten feet deep, disclosing a well-defined mineral lode, and posted at the point of discovery on the surface a notice of location, as required by section eighteen hundred and four of the Revised Codes of North Dakota, and by marking the boundaries of said claim, as required by section eighteen hundred and five of said codes;

That I claim seven hundred feet on the lode east of the center of said discovery shaft and eight hundred feet on the lode west therefrom; that I claim one hundred and fifty feet on each side of the middle of said lode;

That the general course of said lode is east and west;

That the said claim is bounded and described as follows: Beginning at a post two hundred feet northwest of the junc-

tion of Indian gulch with White Cloud creek, which post is hewn on the side facing the claim and marked "Mascot lode, S. E. Cor."; thence northerly one hundred and fifty feet to the east lode post, hewn on the side facing the claim, and marked "Mascot lode, east lode post"; thence continuing in the same direction one hundred and fifty feet to a post, hewn on the side facing the claim, and marked "Mascot lode, N. E. Cor."; thence at right angles westerly seven hundred and fifty feet to a post, hewn on the side facing the claim, and marked "Mascot lode, center north side-line"; thence continuing in the same course westerly seven hundred and fifty feet to a post, hewn on the side facing the claim, and marked "Mascot lode, N. W. Cor."; thence at right angles southerly one hundred and fifty feet to the west lode post, hewn on the side facing the claim, and marked "Mascot lode, west lode post"; thence continuing southerly in the same direction one hundred and fifty feet to a post, hewn on the side facing the claim, and marked "Mascot lode, S. W. Cor.," from which post an oak tree, three feet in diameter, bears southeasterly twenty feet; thence at right angles easterly seven hundred and fifty feet to a post, hewn on the side facing the claim, and marked "Mascot lode, center south side-line"; thence continuing in the same course seven hundred and fifty feet to the point of beginning.

Dated April 6, 1912. JOSEPH BATES, Locator.

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## SOUTH DAKOTA.

The requirements in this state regarding preliminary notices and location certificates for lode mining claims are the same as the requirements in North Dakota, and the forms suggested for the latter state, given on a preceding page, may be used in South Dakota, with the addition of the form of the register's certificate for posting, given below.

### Register's Certificate for Posting.

I, Henry Jones, register of deeds for the county of ——, state of South Dakota, hereby certify: That on the fifteenth day of August, 1912, there was filed for record in my office,

as such register of deeds, a certificate of location of the Mascot lode mining claim, located by Joseph Bates, and situated in the —— mining district, —— county, South Dakota. That said certificate of location now stands of record in my said office, in book M of mining certificates, at page 492, —— County Records.

Witness my hand and official seal, this twenty-ninth day of August, 1912. HENRY JONES,
Register of Deeds.

This certificate or a copy thereof must be posted on the claim, on the same post or tree on which the original notice is posted, within ninety days from the date of the original notice.

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## UTAH.

### Notice of Location for Lode Claim.

NOTICE IS HEREBY GIVEN, that I, George Riter, a citizen of the United States, have, on this tenth day of July, 1912, discovered and located a lode, bearing gold, silver, and other valuable deposits, which lode I have named the Omega lode;

That the general course of the said lode is north and south, and that I claim seven hundred and fifty feet north and seven hundred and fifty feet south of the discovery monument on which this notice is posted; and that I claim three hundred feet on each side of the center of the vein;[1]

That the said claim is located in the Juniper mining district, county of Kern, state of Utah, and is bounded and described as follows, to wit:—

Beginning at a large pine tree twenty feet south of the point where the Summit trail crosses the south bank of Rapid river, which tree is hewn and marked "Omega, N. E. Cor."; thence southerly fifteen hundred feet to a post set in the ground, hewn and marked "Omega, S. E. Cor."; thence at right angles westerly six hundred feet to a tree blazed and

[1] If a placer claim, substitute instead of this paragraph the following: That the said claim consists of a tract of land containing twenty acres.

marked "Omega, S. W. Cor.," from which tree shaft No. 1 of the Sensation mine bears southwesterly one hundred feet; thence at right angles northerly to a post set in the ground, hewn and marked "Omega, N. W. Cor."; thence at right angles easterly six hundred feet to the point of beginning.

Dated July 25, 1912. GEORGE RITER, Locator.

NOTE.—The notice must be posted at the time of discovery, and a substantial copy thereof must be recorded in the office of the county recorder within thirty days after the date of posting, unless the claim is situated within the limits of a mining district having a recorder of its own, in which case two copies of the notice must be filed with such district recorder, who is required to send one to the county recorder.

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## WASHINGTON.

### Preliminary Notice for Posting on Lode Claim.

NOTICE IS HEREBY GIVEN, that I, John Black, a citizen of the United States, have this third day of August, 1912, discovered a lode of rock in place, bearing gold, silver, and other valuable deposits, and hereby claim fifteen hundred feet of the same as a lode mining claim. At the place of said discovery and at the time of making the same, I have posted this notice. The name of said lode shall be the Acme lode.

Dated August 3, 1912. JOHN BLACK, Locator.

### Notice of Lode Location.

NOTICE IS HEREBY GIVEN, that on August 3, 1912, I, John Black, a citizen of the United States, discovered in the Walluma mining district, —— county, Washington, a lode of rock in place, bearing gold, silver, and other valuable deposits, which lode I named the Acme lode.

Thereafter, and before filing this notice for record, I located a claim thereon as follows: I sunk a discovery shaft upon said lode to the depth of twelve feet from the lowest part of said shaft at the surface, disclosing a well-defined vein. I posted at the discovery at the time of making the same, a notice containing the name of the lode, the name of the loca-

tor, and the date of discovery. I marked the surface boundaries of said claim by placing at each corner thereof substantial posts bearing the name of said lode and the date of said location. All of said posts were at least three feet high, four inches in diameter, and set in the ground in a substantial manner.

The general course of said claim and the lode therein is northwest and southeast. I claim in length along said lode six hundred feet northwest and nine hundred feet southeast from the point of discovery. I also claim three hundred feet on each side of the middle of the said lode.

Said claim as marked on the ground is bounded and described as follows:—

Commencing at a post five hundred feet south of Indian rock on the south slope of Wizard mountain, which post is marked "N. Cor. Acme lode, located Aug. 3, 1912"; thence southwest six hundred feet to a post marked "W. Cor. Acme lode, located Aug. 3, 1912"; thence at right angles southeast fifteen hundred feet to a post marked "S. Cor. Acme lode, located Aug. 3, 1912"; thence at right angles northeast six hundred feet to a post marked "E. Cor. Acme lode, located Aug. 3, 1912"; thence northwest fifteen hundred feet to the point of commencement.

Dated October 15, 1912. JOHN BLACK, Locator.

NOTE.—This notice must be filed for record with the county auditor within ninety days from the date of discovery.

### Certificate of Placer Location.

I, Henry Williams, hereby certify: That I have on this fifth day of June, 1912, discovered within the limits of the land hereinafter described a valuable placer deposit, and have on said day posted this notice at the said point of discovery, and claimed said land as a placer mining claim. Said claim shall be named the Williams placer. It is situated on public surveyed lands in —— mining district, county of ——, state of Washington, and is described as the south half of the

southwest quarter of the southeast quarter of section 9, township ——, —— base and meridian.

Dated June 5, 1912. HENRY WILLIAMS, Locator.

Within thirty days from the date of discovery, the above notice must be recorded in the office of the county auditor.

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## WYOMING.

The forms given for the location and recording of lode claims in Washington fulfill the requirements of the laws of Wyoming with the following exceptions: If the claim is upon ground surveyed by the United States system of land survey, the laws of Wyoming require the description to be made with reference to section or quarter-section corners. The laws of Wyoming also require the surface boundaries to be marked by six substantial posts or stone monuments hewed or marked on the sides which face toward the claim, one at each corner and one at the center of each side-line.

The certificate must be recorded in the office of the county clerk and *ex-officio* register of deeds, within sixty days after the date of discovery.

For placer locations the forms given for Colorado may be used. But in Wyoming the locator of a placer claim has ninety days after the date of discovery within which to record his claim.

# PATENT PROCEEDINGS.

## LODES.

PRECEDENTS SELECTED FROM A CASE WHICH HAS PASSED THE SCRUTINY OF THE LAND DEPARTMENT, AND PATENT ISSUED THEREIN, AND MODIFIED SO AS TO INCLUDE THE LATEST REQUIREMENTS.

### Application for Survey.

San Francisco, Cal., September 13, 1894.

United States Surveyor-General, San Francisco:—

*Sir:* As attorneys for James N. Cathey, Andrew McC. Cathey, and William King, claimants, we hereby make application for an official survey, under the provisions of chapter six, title thirty-two, of the Revised Statutes of the United States, and regulations and instructions thereunder, of the mining claim known as the Daisy quartz mine, situate in Coulterville mining district, Mariposa county, California, in section 36, township No. 3 south, range No. 16 east, Mount Diablo meridian. Said claim is based upon a valid location made on June 25, 1890, and duly recorded on July 7, 1890, and is fully described in the duly certified copy of the record of the location certificate, filed herewith. Said certificate contains the name of the locator, the date of location, and such a definite description of the claim by reference to natural objects or permanent monuments as will identify the claim, and said location has been distinctly marked by monuments on the ground, so that its boundaries can be readily traced.

We request that you will send us an estimate of the amount required to defray the expenses of platting and other work in your office, required under the regulations, that we may make proper deposit therefor, and that thereupon you will cause the survey to be made by Charles E. Uren, United States deputy mineral surveyor, and proper action to be taken

thereon by your office, as required by the United States mining laws and regulations thereunder.

LINDLEY & EICKHOFF,
Attorneys for Claimants.

Postoffice address, Mills Building, San Francisco, Cal.

NOTE.—Consult § 670. As to manner of conducting survey, see § 671. Surveyor-general's certificate as to expenditures, § 673.

**Instruments required to accompany the application (section 678).**

I. THE APPLICATION FOR PATENT.
II. THE APPROVED FIELD-NOTES.
III. COPY OF THE PLAT.
IV. CERTIFIED COPY OF LOCATION NOTICE.
V. PROOF OF POSTING ON CLAIM THE NOTICE OF INTENTION TO APPLY FOR PATENT, AND COPY OF PLAT.
VI. PROOF OF CITIZENSHIP.
VII. AGREEMENT OF PUBLISHER OF NEWSPAPER.
VIII. ABSTRACT OF TITLE.
IX. THREE COPIES OF THE NOTICE OF APPLICATION FOR PATENT, FOR POSTING IN LAND OFFICE, FOR PUBLISHER AND FOR GOVERNMENT INSPECTOR.
X. PROOF OF MINERAL CHARACTER OF LAND AND IMPROVEMENTS (BY WITNESSES).

1.

## Application for Patent.

IN THE UNITED STATES LAND OFFICE, AT STOCKTON,[1] CALIFORNIA.

In the Matter of the Application for Patent for the DAISY QUARTZ MINE, Coulterville Mining District, Mariposa County, California.

To the Register and Receiver United States Land Office, Stockton, California:—

State of California,
County of Mariposa,—ss.

James N. Cathey, being first duly sworn, deposes and says: That by virtue of a compliance with the provisions of the

[1] There is no longer a land office at Stockton, that office having recently been consolidated with the office at Sacramento.

laws of the United States and the rules and regulations thereunder prescribed by the land department of the United States, and of the laws of the state of California, governing the acquisition of title to mineral lands on the public domain, this affiant, James N. Cathey, together with Andrew McC. Cathey and William King, are the owners as tenants in common, and are in the actual, quiet, and undisturbed possession of that certain lode mining claim, containing gold and silver, situate in section thirty-six (36),[2] township three (3) south, range sixteen (16) east, Mount Diablo base and meridian, in the Coulterville mining district, Mariposa county, state of California, known as and called the Daisy quartz mine. That his postoffice address and residence are Mariposa, Mariposa county, California.

The area and extent of said mining claim are particularly set forth and described in the official field-notes of survey thereof, herewith filed, referred to, and made a part hereof, dated October 19, 1894, and in the official plat of said survey and notice of application for patent now posted conspicuously upon said mining claim, a copy of each of which is filed herewith, to which reference is hereby made.

Affiant further states that the facts relative to the ownership and right of possession of himself and his said cotenants, are substantially as follows:—

This affiant and the said Andrew McC. Cathey, having theretofore discovered within the boundaries of said claim a ledge of rock in place carrying gold, on June 25, 1890, duly located said mining claim, by posting upon said claim a proper notice of location, and marking the boundaries of said claim so they could be readily traced. Thereafter, and on July 7, 1890, they caused a notice of such location to be recorded in the office of the county recorder of Mariposa county, where the same is now of record in book G of quartz records, at page 209.

[2] This section had been returned as mineral, and the state had selected other lands in lieu thereof.

A certified copy of said notice of location accompanies this application, and is hereby referred to for all the particulars therein contained.

Thereafter, and on September 4, 1893, the said Andrew McC. Cathey sold and conveyed by deed to William King an undivided one-fourth interest in said mining claim, which said deed is recorded in the office of the county recorder of Mariposa county, in book 14 of deeds, page 189; all of which will appear in the abstract of title which accompanies this application and which is referred to for all of the particulars therein contained.

That ever since said date affiant and the said Andrew McC. Cathey and William King have been the owners of said mining claims as tenants in common, holding and owning interests in the same, as follows, to wit:—

James N. Cathey, an undivided one-half thereof;

Andrew McC. Cathey, an undivided one-fourth thereof;

William King, an undivided one-fourth thereof.

That at the time of making said location the said James N. Cathey and Andrew McC. Cathey, locators, were, and are now, citizens of the United States, and said William King is a citizen of the United States, all of which will more fully appear from their several affidavits of citizenship which accompany, and are filed with, this application, reference being made to said affidavits for all the particulars therein contained.

That at the time of making said location said locators entered into the possession of said mining claim, and ever since have been, and with their said cotenant, the said William King, are now in the exclusive possession of the same.

There are no miners' rules or regulations now in force in the Coulterville mining district. Those in existence prior to the passage of the act of congress of May 10, 1872, became obsolete, and have not been observed or in force since the passage of said act.

Traversing said mining claim in a general northwesterly and southeasterly direction is a ledge of rock in place, carry-

ing gold and silver. The ledge crops out at intervals along the lode line of the claim, and the vein is further expressed in several places where it is crossed by small ravines and gulches, and in open cuts, made for the purpose of prospecting the vein. This ledge is considered to be a fork of the "Mother Lode" which traverses the Crown Peak and Crown Head mines, adjoining the Daisy Quartz mine on the northeast.

The ledge in the Daisy quartz mine is inclosed on the footwall by black slate, and on the hanging by diabase. It descends into the earth in a northeasterly direction, its dip being forty-five degrees. Its width ranges from two feet to eight feet. The quartz is of the character familiarly known as "ribbon rock." It carries some free gold and auriferous sulphurets. It can be worked by the ordinary mill process. Assays of the ore range from four to twenty-six dollars per ton. Four hundred tons of ore have been extracted and milled with a net return of approximately fifteen hundred dollars.

The value of the labor done and improvements made upon said mining claim by affiant and his cotenants exceeds the sum of four thousand dollars ($4,000).

Said improvements consist of the following:—

A main working tunnel four feet by six feet, two hundred and forty-five feet long, where at a depth of one hundred and sixty-five feet from the outcrop it intersects the ledge; timbered where necessary. From the face of the tunnel where the ledge is intersected, lateral drifts are extended on the ledge northeast and southwest, aggregating one hundred and thirty feet in length, averaging in width six feet.

The actual expense of running said tunnel and drifts exceeds the sum of twenty-five hundred dollars.

Forty feet of tunnel, forty feet of drifts, and thirty feet of incline on such vein, all of customary size for practical mining operations, the expense and cost of running which exceeded the sum of six hundred dollars.

Other open cuts, exposing the vein, the aggregate cost of which will approximate two hundred dollars.

In consideration of said facts, and in conformity with the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, application is hereby made by affiant in behalf of himself and Andrew McC. Cathey and William King, his cotenants, for a patent from the government of the United States for the said Daisy quartz mine, as so officially surveyed and platted.

JAMES N. CATHEY.

Subscribed and sworn to before me this tenth day of January, 1895. F. E. HALL,
Justice of the Peace in and for No. 3 township, Mariposa county, California.

NOTE.—The certificate of the county clerk of Mariposa county as to the official character and genuineness of the signature of the justice of the peace was attached. This would be unnecessary if the oath had been administered before a notary or clerk of a court of record having a seal.

II.

**The Approved Field-notes of the Survey.**

III.

**Copy of Plat of the Survey.**

IV.

**Certified Copy of Notice of Location.**

NOTICE IS HEREBY GIVEN, that the undersigned, in compliance with requirements of the Revised Statutes of the United States and the local customs, laws, and regulations, have this day located, and claim fifteen hundred linear feet along the course of this lead, lode, or vein, of mineral-bearing quartz, and three hundred feet in width on each side of the middle of said lead, lode, or vein, together with all mineral deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges thereon or appurtenant thereto, situate in the Coulterville mining district, in the county of Mariposa, state of California, and more particularly described as follows, to wit:—

Commencing at an open cut on the lead, lode, or vein, at an oak stake with stone monument around it, on the north side of Merced river, between the Old Red Banks and Crown Peak; thence running in a northwesterly direction a distance of eight hundred and seventy feet, and in a southeasterly direction a distance of six hundred and thirty feet, to a small pine tree and a small oak tree, growing in close proximity to each other, with stone monument around them; the other corner and center monuments are marked by stakes with rock mounds around them.

The claim shall be known as the Daisy mine.

Located June 25, 1890.

JAMES N. CATHEY,
ANDREW McC. CATHEY,
Locators.

State of California,
County of Mariposa,—ss.

I, Maurice Newman, county recorder in and for said county, do hereby certify the foregoing to be a full, true, and correct copy of the notice of location of the Daisy mine, as the same appears of record in my office, in book G, page 209, of quartz records of Mariposa county.

Witness my hand and official seal, this second day of October, A. D. 1894.

(Seal.) MAURICE NEWMAN,
County Recorder.

V.

**Proof of Posting Notice and Plat on Claim.**

[Title same as in I.]

State of California,
County of Mariposa,—ss.

W. A. Jones and William Doidge, each for himself and not one for the other, being first duly sworn according to law, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and was present on the ninth day of January, 1895, when a plat representing the

Daisy quartz mine, situated in Coulterville mining district, Mariposa county, California, and certified to as correct by the United States surveyor-general of California, and designated by him as Mineral Survey No. ——, in township 3 south, range 16 east, Mount Diablo meridian, together with a notice of the intention of James N. Cathey, in behalf of himself and Andrew McC. Cathey and William King, his co-owners, to apply for a patent for the mining claim and premises so platted, was posted in a conspicuous place upon said mining claim, to wit: at the mouth of the main working tunnel upon said claim, marked "tunnel" on the official plat, facing the traveled trail which passes said tunnel, where the same can be easily seen and examined.

A full and true copy of the notice, so conspicuously posted upon said claim, is annexed hereto, marked Exhibit "A," and made a part of this affidavit.

W. A. JONES.
WM. DOIDGE.

Subscribed and sworn to before me, this ninth day of January, 1895.

F. E. HALL,
Justice of the Peace, No. 3 township, Mariposa county, California.

## EXHIBIT "A."

NOTICE OF APPLICATION OF JAMES N. CATHEY IN BEHALF OF HIMSELF AND HIS CO-OWNERS, ANDREW McC. CATHEY AND WILLIAM KING, FOR A UNITED STATES PATENT TO THE DAISY QUARTZ MINE.

NOTICE IS HEREBY GIVEN, that in pursuance of chapter six of title thirty-two of the Revised Statutes of the United States, the undersigned, James N. Cathey, whose postoffice address is Bear Valley, Mariposa county, California, in behalf of himself and Andrew McC. Cathey and William King, co-owners with him, claiming thirteen hundred and seventy and eight-tenths linear feet of the Daisy quartz mine, vein, lode,

or mineral deposit, bearing gold, with surface ground three hundred feet in width on the southwest side of the lode and on the northeast side, width varying from fifty-nine feet on the northwest end-line to two hundred and fifteen feet, or thereabouts, at the southeastern portion of the claim, lying and being situated within the Coulterville mining district, county of Mariposa and state of California, being mineral survey No. ——, is about to make application to the United States for a patent for the said mining claim, which is more fully described as to metes and bounds by the official plat herewith posted, and by the field-notes of survey thereof, now filed in the office of the register of the district of lands subject to sale at Stockton, California, which field-notes of survey describe the boundaries and extent of said claim on the surface, with magnetic variation at eighteen degrees east, as follows, to wit:—

[Here follows description condensed from field-notes. The length and course of the tie line connecting the claim to a government corner and the courses and distances of the exterior boundaries of the claim are all the description required. See suggestions in § 677.]

The said mining claim hereby sought to be patented is bounded as follows, to wit:—

On the northeast by the Crown Lead quartz mine (lot No. 48-A), the Crown Peak quartz mine (lot No. 49-A), and the Jubilee quartz mine; on all other sides by vacant and unoccupied land, the said claim being designated as mineral survey No. —— in the official plat posted herewith.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that, unless their adverse claims are duly filed according to law, and the regulations thereunder, within the time prescribed by law, with the register of the United States land office at

Stockton, in the county of San Joaquin, state of California, they will be barred by virtue of the provisions of said statute.

JAMES N. CATHEY,

In behalf of himself and Andrew McC. Cathey and William King, his co-owners.

Dated and posted on the ground this ninth day of January, 1895.

Witnesses to posting:
W. A. JONES.
WM. DOIDGE.

VI.

**Affidavit of Citizenship of James N. Cathey.**

[Title same as in I.]

State of California,
County of Mariposa,—ss.

James N. Cathey, being first duly sworn according to law, deposes and says:—

I am the owner of an undivided one-half part of the Daisy quartz mine, situated in Coulterville mining district, Mariposa county, state of California, designated upon the official plat thereof as mineral survey No. ——, in township 3 south, range 16 east, Mount Diablo base and meridian.

In behalf of myself and my co-owners, William King and Andrew McC. Cathey, I am about to make application for a United States patent for said Daisy quartz mine.

I am a native-born citizen of the United States. I was born in Saline county, state of Arkansas, in the year 1847, and am now a resident of Mariposa county, California.

JAMES N. CATHEY.

Subscribed and sworn to before me, this ninth day of January, A. D. 1895. F. E. HALL,
Justice of the Peace, No. 3 township, Mariposa county, California.

NOTE.—Similar affidavits were made by Andrew McC. Cathey and William King.

## VII.

### Agreement of Publisher.

[Title same as in I.]

State of California,
County of Mariposa,—ss.

The undersigned, publisher and proprietor of the "Mariposa Gazette," a weekly newspaper published at Mariposa, county of Mariposa, and state of California, does hereby agree to publish a notice, required by chapter six of title thirty-two, Revised Statutes of the United States, of the intention of James N. Cathey to apply for a patent for the Daisy quartz mine, situated in Coulterville mining district, county of Mariposa, state of California, and to hold the said James N. Cathey alone responsible for the amount due for publishing the same.

And it is hereby expressly stipulated and agreed that no claim shall be made against the government of the United States, or its officers or agents, for such publication.

Witness my hand and seal, this ninth day of January, 1895.

JOHN JONES, Publisher.

## VIII.

### Abstract of Title.

The abstract of title exhibits the record history of the claim.

NOTE.—For suggestions as to abstracts, see § 687.

## IX.

### Notice of Application for Patent.

[Notice to be published in the newspaper and posted in register's office and a copy of which is sent to the government inspector, making three copies in all to be furnished to the land office.]

U. S. Land Office,
Stockton, California, January 12, 1895.

NOTICE IS HEREBY GIVEN, that James N. Cathey, whose post-office address is Bear Valley, Mariposa county, California, in behalf of himself and his co-owners, Andrew McC. Cathey

and William King, has filed an application for patent for the lode mining claim called the Daisy quartz mine, situated in Coulterville mining district, Mariposa county, California, and designated by the field-notes and official plat on file in this office as mineral survey No. ——, in township 3 south, range 16 east, Mount Diablo base and meridian, said mineral survey No. —— being described as follows:—

[Here follows description condensed from field-notes, same as in Exhibit "A," attached to instrument IV posted on claim.]

The claims adjoining said Daisy quartz mine as shown by the official plat of survey are as follows: On the northeast the Crown Lead quartz mine (lot No. 48-A), the Crown Peak quartz mine (lot No. 49-A), and the Jubilee quartz mine (lot No. 60). On all other sides the claim is surrounded by unoccupied public land.

J. WALTER SMITH, Register.

NOTE.—For directions as to publications, see §§ 685, 689. For directions as to posting in register's office, see § 691. It has been the custom in many places to insert in the published notice a reference to the place of record of the location notice of the claim applied for and to conclude the notice with a citation to adverse claimants to file their adverse claims within the time prescribed by law. Neither of these statements is necessary. The land department desires the published notice to be as brief as possible, consistent with its containing the legal requirements.

## X.

## Proof of Mineral Character of Land and Improvements (by Witnesses).

[Title same as in I.]

State of California,
County of Mariposa,—ss.

W. A. Jones and William Doidge, being first duly sworn, each for himself and not one for the other, deposes and says:

That he is a citizen of the United States, over the age of twenty-one years, and resides in Mariposa county, California:

That he is by occupation a practical miner, and has followed that occupation for many years;

That he is well acquainted with the Daisy quartz mine, situated in the southern portion of section 36, township 3 south, range 16 east, Mount Diablo base and meridian, in the Coulterville mining district, Mariposa county, state of California.

Said Daisy quartz mine is situated about six miles southeast of the town of Coulterville, and about five and one-half miles northwest of the town of Bear Valley, in said Mariposa county, on the west slope of the Sierra Nevada mountains.

Traversing said mining claim in a general northwesterly and southeasterly direction is a ledge of rock in place, carrying gold and silver. The ledge crops out at intervals within the claim, and the vein is exposed in several places where it is crossed by small ravines and gulches, and in open cuts, made for the purpose of prospecting the vein. This ledge is considered to be a fork of the "Mother Lode," which traverses the Crown Peak and Crown Lead mines, adjoining the Daisy quartz mine on the northeast.

The ledge in the Daisy quartz mine is inclosed on the footwall by black slate, and on the hanging by diabase. It descends into the earth in a northeasterly direction, at an average angle from the horizon of forty-five degrees. Its width ranges from two feet to eight feet. The quartz is of the character familiarly known as "ribbon rock." It carries some free gold and auriferous sulphurets. It can be worked by the ordinary mill process.

The improvements which have been made upon said property by the present owners, James N. Cathey, Andrew McC. Cathey, and William King, are as follows:—

A main working tunnel four by six feet, two hundred and forty-five feet long, where it intersects the ledge. It is timbered where necessary. From the face of the tunnel where the ledge is intersected, lateral drifts are extended on the ledge northeast and southwest, aggregating one hundred and thirty feet in length, and averaging six feet in width. The amount expended for such work exceeds the sum of twenty-five hundred dollars.

In addition thereto, there are forty feet of drifts, an upper incline shaft sunk thirty feet on the vein, all of customary size for practical mining operations, the expense and cost of running and the reasonable value of which exceeded the sum of six hundred dollars; also other open cuts exposing the vein, the aggregate cost of which will approximate two hundred dollars.

W. A. JONES.
WM. DOIDGE.

Subscribed and sworn to before me, this ninth day of January, 1895.

F. E. HALL,
Justice of the Peace in and for No. 3 township, Mariposa county, California.

NOTE.—As the section within which this mine is situated was returned as mineral, this proof may have been unnecessary. But we have advised the practice of submitting full proofs on subject of mineral character: § 689.

Upon completion of period of publication, the claimant filed the following instruments:—

XI. PROOF THAT PLAT AND NOTICE REMAINED POSTED ON CLAIM.
XII. STATEMENT OF FEES AND CHARGES.
XIII. AFFIDIVIT OF PUBLICATION.
XIV. APPLICATION TO PURCHASE.
XV. CERTIFICATE OF CLERK THAT NO SUIT IS PENDING.

## XI.

### Proof that Plat and Notice Remained Posted on Claim During Period of Publication.

[Title same as in I.]

State of California,
County of Mariposa,—ss.

James N. Cathey, being first duly sworn according to law, deposes and says, that he is claimant and co-owner with Andrew McC. Cathey and William King in the Daisy quartz mining claim, situated in Coulterville mining district, county

of Mariposa, and state of California, mineral survey No. ——, the official plat of which premises, together with a notice of intention to apply for a patent therefor, was posted thereon, on the ninth day of January, 1895, as fully set forth and described in the affidavit of W. A. Jones and Wm. Doidge, which affidavit was duly filed in the office of the register, at Stockton, California, in this case; and that the plat and notice so mentioned and described remained continuously and conspicuously posted upon said mining claim from said date until, and including, the twentieth day of April, 1895, including the sixty days' period during which notice of said application for patent was published in the newspaper.

JAMES N. CATHEY.

Subscribed and sworn to before me this twenty-fifth day of April, 1895.

F. E. HALL,
Justice of the Peace in and for No. 3 township, Mariposa county, California.

## XII.

### Statement of Fees and Charges.

[Title same as in I.]

State of California,
County of Mariposa,—ss.

James N. Cathey, being first duly sworn, deposes and says, that he is one of the applicants for patent for the Daisy quartz mine, Mineral Survey No. ——, section 36, township 3 south, range 16 east, Mount Diablo meridian, situate in Coulterville mining district, Mariposa county, California; that he has conducted said application on behalf of himself and his co-owners, and is familiar with the sums of money paid and expended in that behalf; that in the prosecution of said application he has paid out, in the manner below indicated, the following named sums, and no more:—

| | |
|---|---|
| To the United States surveyor-general, for fees, office work, and stationery | $35.00 |
| To the United States deputy mineral surveyor | 75.00 |
| Fee for filing application for patent in land office | 10.00 |
| For publication of notice of application for patent | 60.00 |
| Purchase price of land entered | 70.00 |
| Total | $250.00 |

JAMES N. CATHEY.

Subscribed and sworn to before me, this 25th day of April, 1895.

(Seal.) J. H. CORCORAN,
Notary Public, Mariposa county, California.

XIII.

**Affidavit of Publication.**

[This is supplied by the publisher, and its form is stereotyped.]

XIV.

**Application to Purchase.**

[Title same as in I.]

To the Register and Receiver of the United States Land Office, Stockton, Cal.:—

*Gentlemen:* The undersigned claimants, under the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, hereby apply to purchase that mining claim known as the Daisy quartz mine, situate in section 36, township 3 south, range 16 east, Mount Diablo meridian, designated as mineral survey No. ——. Said mining claim embraces thirteen and ninety-one one-hundreths acres in the Coulterville mining district, in the county of Mariposa, state of California, as shown by survey thereof, and we hereby agree to pay therefor seventy dollars, being the legal price thereof.

Dated April 25, 1895.

(Signed) JAMES N. CATHEY.
ANDREW McC. CATHEY.
WM. KING.

[Upon which the register indorsed the following]:—

I, J. Walter Smith, register of the land office at Stockton, California, do hereby certify that the aforesaid quartz mining claim, or lot No. 61, in section 36, township 3 south, range 16 east, Mount Diablo meridian, as applied for above, is subject to entry by the above-named applicants. The area of said quartz mining claim being thirteen and ninety-one one-hundredths acres; the price thereof is seventy dollars.

(Signed) J. Walter Smith,
Register.

Note.—The land offices usually have blanks for this form.

## XV.

### Certificate That No Suit is Pending.

State of California,
County of Mariposa,—ss.

I, Maurice Newman, county clerk of the county of Mariposa, and *ex-officio* clerk of the superior court thereof, do hereby certify that there is no suit or action of any character pending in said court involving the right of possession to any portion of the Daisy mine, situated in Coulterville mining district, Mariposa county, California, of which mine James N. Cathey, Andrew McC. Cathey, and William King claim the ownership, and for which patent has been applied for, and that there has been no litigation before said court affecting the title to said claim, or any part thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Mariposa, Mariposa county, California, this twenty-fifth day of April, 1895.

MAURICE NEWMAN,
County Clerk of the county of Mariposa, and *ex-officio* clerk of the superior court thereof.
(Seal of the superior court, Mariposa county.)

Note.—A similar certificate must also be secured from the clerk of the United States district court for the district in which the claim is situated. Where there is no adverse proceeding it is not necessary to furnish these certificates.

# PLACER CLAIMS—UNSURVEYED LANDS.

Where a placer claim sought to be patented is situated upon unsurveyed lands, the proceedings are similar to those in cases of lodes, proper allowance being made for the difference in the nature of the deposits (§ 699), a descriptive report being also required from the deputy surveyor, establishing the character of the land (§ 672); but the department requires, in all cases of placers, an affirmative showing that no known lodes exist within the limits of the placer (§ 703).

We select the following illustration as conforming to the regulations of the department in this behalf:—

## Proof That No Known Lodes Exist on Placer Claim.

IN THE UNITED STATES LAND OFFICE, AT STOCKTON, CALIFORNIA.

In the Matter of the Application for Patent for the COOLGARDIE PLACER MINE, Coulterville Mining District, Mariposa County, California.

State of California,
County of Mariposa,—ss.

A. M. da Silva and William Doidge, each of lawful age and resident in the county of Mariposa, state of California, being first duly sworn, each for himself, and not one for the other, saith: That he is a miner by profession; that he is well acquainted with the Coolgardie placer mine, situate in Coulterville mining district, county of Mariposa, state of California, claimed by A. Wartenweiler, applicant for United States patent therefor; that for several years he has resided near said land, and has been, and now is, well acquainted with the character of said land, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not, to his knowledge, within the limits of said placer claim any vein, or lode, of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any other valu-

able deposit in place, upon said claim or any part thereof; that he has no interest whatever in the said placer claim.

A. M. DA SILVA.
WM. DOIDGE.

Subscribed and sworn to before me this nineteenth day of March, 1897.

F. E. HALL,
Justice of the Peace in and for No. 3 township, Mariposa county, California.

NOTE.—An affidavit of similar import, made by claimant, is also filed.

## SAME—SURVEYED LANDS.

Where the placer claim is located by government subdivision, no survey is necessary (§ 672). A descriptive report by a deputy mineral surveyor may be obtained (§ 701), but is not required. Proof of the mineral character of the land must be supplied by affidavits (§ 702).

As the surveyor-general has no office to perform in this class of cases, proof of the five hundred dollars' expenditure for patent purposes must be supplied by claimant. For nature and character of such proofs, consult § 701.

### Proof of Annual Labor.

State of California,
County of Madera,—ss.

John Doe, being first duly sworn according to law, deposes and says:

That he is familiar with the Copper Blossom and Copper Carbonate lode locations, all situated in King Creek mining district, Madera county, state of California, on unsurveyed land, and affiant knows of his own knowledge that at least one hundred dollars' ($100) worth of work and labor was performed on or for the benefit of each of the foregoing locations, making a total of $200 worth for the group during the year 1913, and that said work was done in behalf of the owner, Copper Mountain Mining Company. Said work consisted in making open cuts in each instance, and said work was done

in good faith for the purpose of holding and developing said claims in compliance with the mining laws.

JOHN DOE.

Subscribed and sworn to before me this —— day of December, 1913.

RICHARD ROE,

Notary Public in and for the county of Madera, state of California.

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